No. 11342

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY,
a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Brief of Appellant

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JURISDICTIONAL STATEMENT

The action is one in eminent domain instituted by the Attorney General of the United States at the request of the Secretary of Agriculture under Chapter 728 of the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C.A. Section 257. By its initial pleadings, the government sought to acquire an easement in certain lands in the State of Washington lying wholly outside the exterior boundaries of the Olympic National Forest as a means of access to and for the removal of timber in said forest. By subsequent amendments, the purpose or scope of the action was enlarged to include the acquisition in

fee of the lands over which an easement only was originally sought as well as the acquisition of certain other or additional lands. (See letters of Secretary of Agriculture to Attorney General dated January 8, 1942 (R. I, 13), April 21, 1942 (R. I, 45), and November 2, 1943 (R. I, 79), petition in condemnation (R. I, 2), amended petition in condemnation (R. I, 47), and second amended petition in condemnation (R. I, 92).)

On May 23, 1944, the District Court entered judgment (R. I, 108) on the third declaration of taking, which had been filed November 12, 1943 (R. I, 82). Polson Logging Company's appeal to this Court from said judgment was dismissed on the ground that "such a judgment was not a final decision." *Polson Logging Company* vs. *United States,* 149 Fed. (2) 877.

Following the return of this Court's mandate, the court proceeded to trial by jury of the issue of just compensation and, after denial of a motion for a new trial (R. II, 296), judgment was entered December 19, 1945, fixing compensation in accordance with the jury's verdict and decreeing that title was vested in the United States free and clear of all claims and encumbrances whatsoever (R. II, 299). Notice of appeal and bond for costs on appeal were filed March 18, 1946 (R. II, 306-307).

Such judgment is final and appealable. *Polson Logging Company* vs. *United States,* 149 Fed. (2) 877; *Catlin* vs. *United States,* 324 U. S. 229, 65 Sup. Ct. 631, 89 L. Ed. 911.

The jurisdiction of the District Court is based upon 28 U.S.C.A. Section 41 (1), 40 U.S.C.A. Section 257.

The jurisdiction of this Court is based upon 28 U.S.C.A. Sections 225 and 230 and Rule 73 of the Rules of Civil Procedure.

STATEMENT OF THE CASE

By the original petition in condemnation (R. I, 2) and the original declaration of taking (R. I, 16) filed January 21, 1942, the government sought to acquire an easement in or over certain strips of land 100 feet wide following the course of logging railroad grades constructed by appellant, Polson Logging Company, and extending from a junction with Olympic National Highway in Section 35, Township 21 North, Range 10 West of the Willamette Meridian, northeasterly across Township 20, Range 9 West of the Willamette Meridian, to the south boundary line of the Olympic National Forest. Following such filing, the District Court on the application of the government but in the absence of the respondents named in the petition in condemnation and without

any notice to any of them entered judgment on said original declaration of taking (R. I, 23). Polson Logging Company, who will hereinafter be referred to as "appellant," promptly upon hearing of such action appeared in the cause and moved to vacate, set aside or otherwise adjudge null and void said judgment upon the ground that the declaration of taking, upon which it purported to be based, wholly failed to show that the Secretary of Agriculture had any authority to acquire the lands described in such judgment, that he, in fact, did not have any such authority, and that said judgment constituted a taking of the property of appellant without due process of law and was therefore contrary to and violative of the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States and the Ninth Amendment to the Constitution of the State of Washington (R. I, 32). After being served with notice and summons, appellant demurred to and moved to dismiss the petition in condemnation upon the same grounds (R. I, 35). Hearing of those motions was continued from time to time pending negotiations between appellant and officials of the United States National Forest Service looking to an amicable settlement of the matters involved in the proposed taking (R. I, 38-44). These negotiations having proved abortive, the government on October 22, 1943, filed an amended petition in condemnation (R. I, 47) and a second declaration of

taking dated April 21, 1942 (R. I, 60) whereby the government sought to acquire fee title to the lands over which it had previously sought an easement only, and also fee title to certain additional lands, *all of which were and are wholly outside the Olympic National Forest.* No judgment on said second declaration of taking was applied for but appellant moved against it, both orally and in writing, in the same manner as it had moved against the original declaration of taking.

After extended argument involving several days of hearings, the District Court sustained appellant's motions and on November 12, 1943, made and entered an order adjudging both declarations of taking, namely, the original filed January 21, 1942 and the second filed October 22, 1943, unauthorized and insufficient to vest title in the United States of America and of no effect; vacating, setting aside and quashing the judgment entered January 23, 1942; and dismissing both the original petition in condemnation and the amended petition but without prejudice to the filing of a new or amended petition (R. I, 75).

General exceptions were allowed in this order but the government acquiesced therein and in accordance with the leave thereby granted filed on the same day a third declaration of taking (R. I, 82) and thereafter a second amended petition in condemnation (R. I, 92) which differ from the second dec-

laration of taking and the amended petition in condemnation only by adding to the statutes previously given as constituting authority to acquire, the Federal Highway Act approved November 9, 1921, an Act of September 5, 1940 (54 Stat. 867), the Department of Agriculture Appropriation Act 1944, approved July 12, 1943, and an amendment to the Federal Highway Act, approved July 13, 1943. Appellant moved against this third declaration of taking in the same manner and upon the same grounds as it had moved against the previous declarations of taking (R. I, 86). This motion came on to be heard in the following term of the District Court.

Following extended argument (R. I, 185-206), the court ruled:

> "If full expression be given to the language of that order (the order of November 12, 1943), I would feel that I was foreclosed from making any other than a similar one at this time." (R. I, 206.)

and notwithstanding the government had made no application to vacate or in any way modify that order, on its own motion, modified that order, saying:

> "I shall be compelled, at this time, in this hearing, to virtually repudiate a part of the order that I made at that time, that is, in so far as it may be a finality." (R. I, 208. See also R. I, 217.)

In accordance with that ruling, the District Court

on May 23, 1944, granted government's motion for the entry of judgment on the third declaration of taking, filed November 12, 1943; denied appellant's motion to quash and adjudge null and void said declaration of taking; granted the government's request that its second amended petition in condemnation be filed; and on its own motion, modified its order of November 12, 1943 (R. I, 99), and made and entered a judgment on said third declaration of taking (R. I, 108).

By the terms of that judgment, the district Court purported to confirm whatever possession the government had taken two years previously by virtue of the judgment entered January 23, 1942 on the original declaration of taking, which judgment the Court had six months earlier and in a previous term of the court, vacated, set aside and held for naught because the declaration of taking on which it was based was unauthorized.

Polson Logging Company's appeal from that judgment was dismissed as premature, this Court saying:

> "The judgment on the taking may still be attacked on an appeal from the subsequent and final judgment in which damages are determined."
>
> *Polson Logging Company* vs. *United States,* 149 Fed. (2) 877, at 878.

After the filing of this Court's mandate, appellant renewed its challenge to the sufficiency, effectiveness and validity of the third declaration of taking and again moved to quash or otherwise adjudge null and void the judgment entered thereon on May 23, 1944 (R. II, 250). That motion, together with appellant's motion to dismiss and strike and its demurrer to the second amended petition in condemnation which had been filed May 23, 1944, were denied and overruled November 12, 1945 (R. II, 257). Appellant, following the suggestion in this Court's opinion on the first appeal (Opin. 149 Fed. (2) p. 878) and to preserve the record in respect of its attack on the legality and validity of the taking (R. II, 331-332), filed an answer on November 12, 1945 (R. II, 259) reasserting its denial of any authority in the Secretary of Agriculture to acquire the property here involved.

After four days of trial, during which the District Court erred to the prejudice of appellant in excluding evidence and instructing the jury in respect of matters to be taken into consideration in determining just compensation, as will be hereinafter particularly specified and demonstrated, the jury returned its verdict fixing the just compensation for the lands taken at $6500.00 (R. II, 289). Appellant moved for a new trial, which motion was overruled (R. II, 290 and 296), and judgment was entered on the verdict

December 19, 1945 (R. II, 298).

This appeal followed.

QUESTIONS INVOLVED

Two primary and several secondary questions are presented by this appeal.

I. Primary question No. 1, raised by appellant's several motions to quash and adjudge null and void the successive declarations of taking, its several motions to dismiss the successive petitions in condemnation, its answer, and its motion for a new trial, is:

> Whether the proposed taking by the United States of America was authorized by the statutes upon which it was predicated?

Secondary thereto are the following further questions:

A. Was the purported taking of the so-called gravel lands, Tracts 2 and 3, as more particularly described in the second and third declarations of taking, authorized by the statutes upon which it was predicated, or at all?

B. Did the District Court have jurisdiction on May 23, 1944, in its February 1944 term, to set aside or amend or modify the order entered by it on November 12, 1943, in its previous July 1943 term?

C. Is not the government, by reason of its failure to except to the order of November 12, 1943 and its acquiescence therein by filing a third declaration of taking and a second amended petition in condemnation, estopped to question the propriety of that order and are not both the Court and all parties to the case bound by the ruling embodied in that order as the law of the case?

II. Primary question No. 2, raised by the Court's rulings and instructions to the jury on the elements to be considered in determining just compensation and appellant's objections and exceptions thereto, is:

> Whether in determining just compensation there could be taken into consideration, (a) the timber of others, including the large stand of National Forest timber, which is tributary to and accessible from the roads taken and will naturally and normally be removed thereover; and (b) the earnings that might reasonably be expected from tolls charged for the use of such roads for such transportation?

SPECIFICATION OF ERRORS

The District Court erred as follows:

1. In denying appellant's motion to quash and adjudge null and void the third declaration of taking filed November 12, 1943 (R. I, 99).

2. In modifying on May 23, 1944, its order en-

tered November 12, 1943 (R. I, 100).

3. In granting the government's motion for the entry of judgment on said third declaration of taking (R. I, 100).

4. In entering judgment on May 23, 1944, on said third declaration of taking (R. I, 108).

5. In purporting, by said judgment of May 23, 1944, to confirm whatever possession was taken on or about February 5, 1942, under and pursuant to a judgment entered January 23, 1942, on the original declaration of taking filed in the cause, which judgment had been vacated, set aside and quashed by the court's order of November 12, 1943 (R. I, 112).

6. In denying appellant's motion to dismiss and strike the second petition in condemnation (R. II, 257).

7. In overruling appellant's demurrer to said second amended petition in condemnation (R. II, 258).

8. In denying appellant's motion to quash and adjudge null and void the third declaration of taking and to vacate the judgment entered thereon on May 23, 1944 (R. II, 258).

9. In entering its order of September 24, 1945, fixing the date of valuation of the property taken

as October 22, 1943 (R. II, 253).

10. In instructing the jury:

> "In regard to the time when the Government took possession of this property, you are instructed as a matter of law that it acquired fee simple title to the property on Ocober 22, 1943." (R. III, 764.)

to the giving of which instruction appellant excepted as follows:

> "Mr. Metzger: I would ask on behalf of respondent a further exception to that instruction, wherein the Court advised the jury that the government acquired full title to this property on October 22, 1943, it being our position as heretofore stated, First, that the declaration of taking of that filing date, has heretofore been held null and void, and that order has not been—as to that effect, has not been set aside, and is the law of this case; and Secondly, that—
>
> "The Court: October the 22nd, 1943?
>
> "Mr. Metzger: Yes, that order—
>
> "The Court: I don't know that that order set aside—
>
> "Mr. Metzger: The order of November 12, held that declaration of taking null and of no effect. That order so holding has never been set aside.
>
> "The Court: Well, there were certain limitations in that order.

"Mr. Metzger: I appreciate, Your Honor. I am again—

"The Court: But you may make your record.

"Mr. Metzger: I am making my record, Your Honor please, and for the further reason that the record in this case, neither the declaration nor the second amended petition in condemnation, shows any authority in the Secretary of Agriculture to acquire these lands, at all.

"The Court: Your exceptions will be noted and allowed, Mr. Metzger." (R. III, 781-782.)

11. In refusing appellant's requested Instruction No. 3, as follows:

"Instruction No. 3

"The owner of property sought to be condemned is entitled to its 'market value fairly determined.' That value may reflect not only the use to which the property was devoted at the time as of which the market value is to be determined, but also that use to which it may be readily converted. In that connection, the value of the property is not to be measured merely by the use to which it is or can be put as a separate tract, but you must consider and determine that value in the light of any special or higher use for which the property in question may be available in connection with other properties, if you find from the evidence that there is a reasonable probability of such connection in the reasonably near future." (R. II, 280.)

to the refusal of which instruction appellant excepted as follows:

"Mr. Metzger: If Your Honor please, the respondent Polson Logging Company excepts to the Court's refusal to give its requested instruction No. 3 . . . and particularly to the refusal to give to the jury either in that instruction or in any of your instructions, the low that the jury must consider and determine the value of the property in the light of any special or higher use for which it may be available, in connection with other properties, if they find from the evidence that there is a reasonable probability of such connection in the reasonably near future. That I believe is the law as laid down by the Supreme Court of the United States in the Powelson case cited to the Court with that instruction.

"The Court: Your exception will be noted. The Court takes the position it gave in substance the instruction as requested, but in its own language.

"Mr. Metzger: When 'noted', that means an exception is allowed?

"The Court: Exception is allowed." (R. III, 777-778.)

12. In refusing appellant's requested Instruction No. 8, reading as follows:

"Instruction No. 8

"In arriving at the value of the property involved in this case, it is essential that the jury

consider the character, nature and extent of the improvements and the uses to which the land in its improved state may be put. The jury should consider whether the property is adapted to the particular uses claimed for it and whether it is or it is not profitable and valuable for such uses. Whether property is profitable and valuable for a particular use is always a controlling consideration in determining the value of the property itself." (R. II, 282-283.)

to the refusal of which instruction Appellant excepted as follows:

"Mr. Metzger: We except to the refusal of the Court to give our—Respondent's requested instruction No. 8, which is an instruction stating the law of this state as laid down by the Supreme Court of the state in the case of the Montana Railway Company vs. Roeder, 30 Wash. 240, which was cited to the Court with the instruction. Is that exception allowed, Your Honor?

"The Court: The exception is allowed, yes." (R. III, 778.)

13. In refusing appellant's requested Instruction No. 13, reading as follows:

"Instruction No. 13

"The jury are instructed that in determining the just compensation to be paid respondent Polson Logging Company, they are to take into consideration the nature and extent of the property of the respondent, with the improvements thereon, in the condition in which it was on

October 22, 1943, what it would have cost to reconstruct or reproduce said property and such improvements at that date, the depreciation which had accrued at said date in said property, the timber which was rendered accessible or was tributary to and which the jury believe from the evidence will in reasonable probability be transported thereover, the revenue which said respondent has heretofore derived from the use of such property for the transportation of logs and timber products together with the revenue which they believe it is reasonably probable that said respondent would have derived in the future, and any and all other factors which the jury believe would be given consideration and weight in bargaining for the sale and purchase of such property between purchasers willing and able but not compelled to buy, on the one hand, and sellers willing but not compelled to sell, on the other." (R. II, 286.)

to the refusal of which instruction appellant excepted as follows:

"Mr. Metzger: If Your Honor please, in connection with that instruction, I submitted it for the purpose of—did not expect Your Honor would give it, because—well, I submitted it for the purpose of making a record on its refusal, and I do not think Your Honor needs to examine it, so I take an exception to the refusal of the Court to give respondents Instruction 13.

"The Court: Your exception will be noted and allowed. Now, then as to the instructions given." (R. III, 779.)

14. In instructing the jury as follows:

"Potential uses of this property can not be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of this property is for truck or road purposes, then you will take into consideration the wants or needs as such may reasonably be expected in the near future by those who would make use of this property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question." (R. III, 764.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: The respondent excepts to the instruction of the Court where the Court instructed the jury variously, in four portions of the instructions, upon the same subject, substantially.

"In the first instance the Court told the jury substantially that in considering the uses to which the property might be put and for which it might be available, they should not include in or consider the hauling of any forest products not theretofore sold by the government on the date of taking. To that instruction we except because of our position heretofore stated throughout the trial that we believe the buyer and seller reasonably informed, would have considered the existence of that forest, and the fact that the government program called for, and in all reasonable expectation there would have been a cut from the forest twenty

million feet per year, and that would have furnished a traffic over the road which would have returned compensation to the owners of the road, and that those things reflect the market value of this road on October 22, 1943, and would have been given consideration by a buyer and a seller.

"The Court: Your exception will be noted and allowed." (R. III, 779-780.)

15. In instructing the jury as follows:

"And in that connection, I instruct you again, as I have heretofore, and probably shall further, that when the uses of this property was taken into consideration by the prospective buyer and prospective seller, those uses can not include any earnings that the property may make by reason of having transported thereover any timber that grows in the national forest that may be contiguous to it, or within the watershed." (R. III, 766-767.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: For the same reason we except to the later charge of the Court upon the same subject, where the Court told the jury that the jury could not include in the uses of the road to be given consideration, any earnings from timber in the national forest. For the same reason,—

"The Court: "Yes, go right ahead." (R. III, 780.)

16. In instructing the jury as follows:

"In determining the just compensation to be paid for the taking of this property, you will not take into consideration any timber owned by anyone except the respondent, Polson Logging Company, in the use of the lands taken as a truck logging road. Any special value that the road may have to the government for use in connection with its national forest must be excluded by you as an element of market value. The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move." (R. III, 768.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: For the same reason we further except to the subsequent charge to the jury that no consideration should be given or allowance made for any value in the road taken, because of the government owned timber that might or would move over the road.

"The Court: Exception may be noted and allowed."

* * *

"Mr. Blair: Respondent further excepts to that portion of the Court's charge wherein the Court told the jury in substance that they should not take into consideration any timber owned by

others than Polson Logging Company.

"The Court: Yes, you may have an exception." (R. III, 780-781.)

17. In instructing the jury as follows:

"You can allow only such value for the lands taken which you believe a private purchaser, acting as a reasonably prudent person, and being an informed man, would pay for it, knowing that he could not anticipate any earnings or revenues that he might derive by reason of the national forest timber which is in the Humptulips Watershed." (R. III, 768.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: And for the same reason we except to that portion of the jury's charge where the Court charged the jury in substance that they should not consider any earnings from timber in the United States forest, and particularly that part thereof constituting the Humptulips River watershed.

"The Court: You are not excepting to the fact that I used the 'Humptulips Watershed', but as it applied to forest timber?

"Mr. Blair: That is correct." (R. III, 780-781.)

18. In ruling at the conclusion of the first day of the trial, that revenues or earnings for the use of the roads taken for the transportation of timber from

the Olympic National Forest to the public highway could not be taken into consideration in determining just compensation, as follows:

> "The Court: Now, there are apparently at least two legal matters that should be disposed of.(,) I think before we go much farther in this case, and we can expedite it by making a disposition of it, and one is as to whether this is a public road, . . . (R. II, 406) The other that I would like to settle is this issue that has just been suggested slightly here in the course of the afternoon, that you were going to claim compensation based upon toll values of the hauling over the road from the National Forest to the public highway, . . . (R. II, 411.)
>
> "The Court: I shall now hold on the two issues passed upon, the one, that is benefits to the adjoining land owner except as they involve asserted losses, claimed by severance, cannot be shown; that the respondent on the other hand cannot show as an item of compensation any future potential or prospective tolls that he might have earned on this road by the haulage from the forest of growing timber, or by any use that the general public might make to this way of ingress and egress to enter the forest, or go from the forest at any time." (R. II, 420-421.)

to which latter ruling appellant excepted as follows:

> "Mr. Blair: In order to protect the record, we except to Your Honor's ruling that we are not entitled to show prospective earnings; that an owner not compelled to sell and a buyer not compelled to buy, would consider those respective earnings in arriving at the fair cash market value.

"The Court: I think it is perfectly proper to except, and your exceptions are allowed, and I presume the Government excepts to the ruling against accepting benefits." (R. II, 422-423.)

Cf. the Court's latter restatement of this ruling, as follows:

"The Court has ruled upon this issue that what timber is there in this National Forest that is contiguous to this—and moves out over this road, cannot be a factor in fixing market value of the road, . . ." (R. II, 672.)

19. In limiting cross examination of the government's witness Paul H. Logan so as to prevent appellant proving by said witness the quantity of timber in the Olympic National Forest which would normally come out over the roads taken by the government, as follows:

By Mr. Metzger:

"Q. Well, how much north in the national forest for logging purposes is accessible or tributable to come out over these roads?

"A. Owned by the same party?

"Q. No, how much timber.

"Mr. Keenan: That is objected to.

"The Court: I think that I will sustain the objection. You mean how much Government timber?

"Mr. Metzger: I don't care; how much timber?

"The Court: I will sustain the objection unless you qualify your question to cover privately held timber. I thought I made it clear yesterday on this issue. I don't mean to keep you from making your offer of proof. The position of the Court is, and the jury will be charged in due time, that no estimate can be made on the hauling of the national forest products over this or any other road within the next year or ten years or any other time." (R. II, 497.)

20. In limiting cross examination of government's witness Paul H. Logan so as to preclude the appellant from proving by said witness that all timber in the area the sale of which was contemplated by the government would come out over the roads taken, as follows:

"Q. And all of the sales that the Government contempates of timber in that area will come out over this road?

"Mr. Keenan: That is objected to, if the Court please.

"The Court: I shall sustain the objection to the question. I shall have to sustain the objection.

"Mr. Metzger: Well, we offer to prove by this witness that his answer to that question would be in the affirmative.

"The Court: I am assuming that the petitioner objects to your offer of proof.

"Mr. Keenan: I object to the offer of proof. I think it is irrelevant and immaterial.

"Mr. Metzger: Allow us an exception." (R. II, 500-501.)

21. In limiting cross examination of the government's witness Paul H. Logan so as to preclude the appellant from proving by said witness that in specific sales of timber in the Olympic National Forest the government advertised that the roads taken would be available for the removal of the timber involved in such sales, as follows:

"Q. Mr. Logan, in advertising this sale in Section 2, 21, North Range 9 West, and 34 and 35, Township 22 North, Range 9 West, the advertisement was published, was it not?

"A. Yes.

"Mr. Keenan: That is objected to. I conceive that irrelevant and immaterial as far as applied to any issue in this case is concerned.

"The Court: He has answered in the affirmative. I don't know what the purpose of this question is.

"Q. And in advertising that sale, it was stated that this road would be available for the removal of the timber?

"Mr. Keenan: That is objected to, Your Honor.

"The Court: Sustain the objection.

"Mr. Metzger: Exception, and again we offer to prove that this is a matter of public advertisement that the Government and all persons generally in considering market value are advised by the Government that they propose to use this road as a means of removing this timber.

"The Court: Yes, but Mr. Metzger, if you assume that to be a fact, it probably is a fact, but that still does not become a factor in fixing the value the Government must pay for the road, or the land.

"Mr. Metzger: Any purchaser or seller would take that into consideration in arriving at what they would pay.

"The Court: That may or may not be the objective the Government had in acquiring this right of way.

"Mr. Metzger: They stated so in this petition this declaration of taking.

"The Court: It is not material to the jury in placing the value they are going to place upon it.

"Mr. Metzger: "Allow me an exception.

"The Court: Yes." (R. II, 503-504.)

22. In limiting cross examination of the Government's witness Logan so as to preclude the appellant from proving by said witness that the proposed use of the roads taken for the removal of the Olympic

National Forest timber was a use for which the roads taken were available at the time of the taking, as follows:

"Q. (By Mr. Metzger) The highest and best use by the Government is the use for which this land is available, is it not?

"Mr. Keenan: That is objected to, Your Honor. It is obvious here that the Government is going to put the highest and best use, but that highest and best use does not relate to the Government use.

"Mr. Metzger: If that is the highest and best use, that is the rule, whoever it is.

"The Court: I don't think that is the rule of law. The use they put it to is not necessarily the fact, whatever they may see fit to use it for under their sovereign right to take it cannot be made the determining factor in what actually was the highest and best use at the time they did take it.

"Mr. Metzger: It is not a question of what then was the highest and best use. The question is, what is the highest and best use to which it may reasonably be put in the reasonable future by anybody, Government or anybody else.

"The Court: Well, the law might be subject to some qualification there. I think I shall sustain the objection." (R. II, 508-509.)

23. In limiting cross examination of the Government's witness Norman Porteous and thereby pre-

cluding appellant from proving by said witness that a business man would reasonably expect to collect a toll or charge of $1.50 per thousand feet for the transportation over the roads taken of timber removed from that area of the Olympic National Forest lying to the north of said roads, as follows:

> "Q. (By Mr. Blair) You would reasonably expect, wouldn't you, Mr. Porteous, the timber immediately to the north, a dollar and a half a thousand would be a fair charge that you would have been able to obtain for moving it over your road?
>
> "Mr. Keenan: That is objected to.
>
> "The Court: Objection sustained.
>
> "Q. You say you would expect to get what the traffic would bear?
>
> "A. Yes.
>
> "Mr. Blair: I think that is all." (R. II, 528.)

24. In denying appellant's motion made at the conclusion of the Government's case to dismiss the action as to tracts 2 and 3, said motion and the Court's ruling being as follows:

> "Mr. Metzger: At the conclusion of the Government's case, the respondent, the Polson Logging Company, moves to dismiss the action as to tracts two and three, being the acreage, on the ground that there is no evidence here that the

taking is for any authorized purpose, but merely to enlarge the boundaries of the Olympic National Forest for the purpose of growing trees there, which is prohibited by statute unless sanctioned by a special act of Congress. (R. III, 537-538.)

"Mr. Metzger: I move to dismiss the petition as to tracts two and three on the ground there is no showing that the lands are valuable for the uses for which it is now testified they are sought to be taken and there is no authority for the taking of those lands for the purposes which the government testimony alone disclosed they are valuable.

"The Court: The motion will be denied and an exception allowed." (R. III, 575-576.)

25. In refusing to permit appellant to prove by its witness Andrew Anderson the quantity of timber in the National Forest which could or might be removed over the roads taken, as follows:

"Mr. Metzger: Q. Are you familiar with the timber in the National Forest—I think I have asked you this, immediately north of Township 21, 9 and the Township to the West, and the Township to the east?

"A. I am.

"Q. About what quantity of timber is there, there, which could be removed over this road?

"Mr. Keenan: That is objected to, Your Honor, the amount of timber in the National Forest that could be removed over these roads.

"The Court: The objection will be sustained.

"Mr. Metzger: The government testified to that in part already, Your Honor.

"The Court: I thought you developed that on cross-examination.

"Mr. Metzger: No, that was developed—

"The Court: But it is not an issue. The Court has taken a stand in this matter. It might possibly be—it would be so remote I doubt whether it should even be brought to the consideration of the jury. I think I shall sustain the objection as to the timber that might or might not be hauled over this road.

"Mr. Metzger: All right, Your Honor.

"The Court: You will have an exception." (R. III, 604-605.)

26. In refusing to permit appellant to prove by its witness Len Forrest that roads taken were used in the year 1945 for the removal of National Forest timber, as follows:

"Q. As a matter of fact, in the year 1945, has any National Forest timber been taken out over this road?

"Mr. Keenan: If the Court please—

"The Court: I shall sustain the objection. That is subsequent to the date of taking.

"Mr. Metzger: If Your Honor please, I think that the evidence goes to the adaptability of this road for that purpose, regardless of when it was done.

"The Court: I do not think there is any issue here, but that the road is adaptable to hauling logs if it is constructed and rebuilt to meet that situation.

"Mr. Metzger: Well, the removal of the forest timber is the direct issue, and I think we are entitled—

"The Court: Well, the Court has held, Mr. Metzger—

"Mr. Metzger: I know you have held that the tolls could not be shown, but the adaptability of this road to remove the National Forest timber, I think it was in—not within Your Honor's ruling. At least, I did not understand that was Your Honor's ruling—that Your Honor's ruling went that far.

"The Court: I did not understand there is any issue, but I don't think that will help fix values, but that the road is going to be used in the years to come for the removal—over which Forest timber will be hauled when sold.

"Mr. Metzger: All right.

"The Court: You do not contest that issue, do you, Mr. Keenan?

"Mr. Keenan: No, we do not contest that, Your Honor." (R. III, 629-630.)

27. In refusing to permit appellant to prove by its witness Charles E. Reynolds that it is current practice for a truck logger to hire the use of a logging road owned by another at a rate fixed by the quantity of logs taken; that it is the policy and practice of the United States Forest Service to sell national forest timber to private loggers to cut and remove; and that a buyer and seller dealing at arm's length for the roads taken would have given consideration to the Olympic National Forest timber to the north, and would have expected that timber to be sold in reasonable quantities from year to year and to be logged over the roads taken, as follows:

"Q. (By Mr. Blair) And state whether or not, Mr. Reynolds, it is a matter of rather ordinary practice in truck logging in these days for one logger to hire the use of a logging road owned by another party at a rate fixed by the quantity of logs taken over the road?

"Mr. Keenan: That is objected to.

"The Court: I think I shall sustain the objection.

"Q. Mr. Reynolds, state whether or not it is the policy of the Forest Service—well, state what the policy of the Forest Service is with respect to whether it logs its own mature timber or sells the timber to private loggers to cut and remove?

"Mr. Keenan: That is objected to, Your Honor.

I think it has no bearing on the value here, the policy of the Forest Service with respect to the disposal of its own timber.

"The Court: No, I don't think it is a matter of policy. I think it is a matter of law and regulation provided under the law.

"Q. Well, can you state, Mr. Reynolds, what the practice is in the Forest Service with respect to whether it logs its own timber or sells that timber to private operators to log?

"Mr. Keenan: That is objected to, Your Honor. I think it makes no difference whether it is the practice, or under the law, or what the situation is. They act, of course, under statutes. I don't see it has any bearing.

"The Court: The Court has ruled upon this issue that what timber is there in this National Forest that is contiguous to this—and moves out over this road, cannot be a factor in fixing market value of the road, or fixing appreciation or depreciation to the remaining land.

"Mr. Blair: I want to get the witness far enough so I can make an offer of proof, covering —or to come within that ruling that the Court has just announced, and if the objection to this question is sustained, then I will use that as the basis for making an offer of proof.

(Question read.)

"A. I think it has.

"Q. What was the practice?

"Mr. Keenan: If you are asking this preliminary to an offer of proof, I will withdraw my objection.

"A. As far as I am aware, I think the general practice is to sell the timber to private operators.

"Q. Mr. Reynolds, would you have, if you had been either the owner, willing, but not compelled to sell, or prospective buyer, willing but not compelled to buy the road that is under condemnation here, on October 22, 1943, would you have considered and given consideration to the timber that is standing in the Olympic National Forest to the north of the road, and would you have expected that that timber would be sold by the Forest Service in quantities—of reasonable quantities from year to year, and would you reasonably have expected that it would be logged over this road?

"Mr. Keenan: That is objected to, Your Honor.

"The Court: I will sustain the objection and allow an exception." (R. III, 671-673.)

28. In denying the appellant's offer of proof by its witness Charles E. Reynolds, as follows:

"Mr. Blair: We offer to prove by the witness Charles Reynolds, that the property under condemnation had value to buyer and seller, generally, on October 22, 1943, irrespective of whether that buyer or seller owned any timber in the Olympic National Forest north of the highway, because an informed and reasonably advised and prudent person in the position of a buyer—prospective buyer or prospective seller, would have taken into

consideration and given value to this road, because of the reasonable prospect that the timber in the national forest would be sold to private loggers, and that in ordinary experience and probability, that timber would be removed to market over the road that is under condemnation, and that owners of that timber—purchasers of it from the government and other owners in the forest would pay the reasonable value of their use of this road for that purpose, and that those factors would have been considered by advised and informed persons in the position of prospective buyers and sellers of this property on October 22, 1943.

"The Court: Your offer does not offer to include how much of that timber would be sold in any given period of time.

"Mr. Blair: No, it does not. I don't know whether the testimony is in the record, but it may be. If not, I would like to include in the offer that they would have anticipated that in the ordinary and reasonable course of events that timber would be sold by the Forest Service at the rate of approximately twenty million feet per year.

"Mr. Keenan: It is objected to, Your Honor.

"The Court: The objection will have to be sustained to the offer, and an exception allowed." (R. III, 700-701.)

29. In striking the testimony of the appellant's witness Blain H. McGillicuddy that the fair cash market value of the roads taken was $250,000, as follows:

"Mr. Keenan: At this time I move to strike the testimony of this witness as to the fair cash market value of the lands. He has stated that a purchaser of the land at his figure would be some one interested in taking a gamble on it—in exploiting the government timber which this road extends to, and I submit that is not—

"The Court: I am inclined to think that the motion has to be granted. I am willing to hear from the Respondents.

"Mr. Blair: Your Honor, we believe the correct rule of law is that the value of this property to the government at the time of the taking can not be considered by the jury. It is the question of what did the Polson Logging Company lose, and what did the government acquire, that is material here. However, it already appears as evidence in this case that it would have been reasonably expected by an owner or a prospective purchaser of this logging road in 1943, that the timber in the government's national forest would be, from time to time, sold. The testimony was that it is the last stand and the most immediately available stand to keep the mills in the Grays Harbor area in operation, and a buyer and a seller at that time would normally and naturally have considered the prospect that from time to time that timber would come out over this road, and they would get the value of the service of the road in removing that timber.

"Now the rule is that you can not consider the value of the timber to the taker, and when the taker is the only one that could use the property for the purpose taken, then that use cannot

be considered, but when the service is available to the taker, and when the use for which the taker is taking the property could have been available to another party, then that use may be considered. So here, a private owner could—Polson Logging Company or someone else, could have continued to own this road. True, it is, they are not entitled to any damages for any prior right to purchase government timber out of the government watershed. They are not entitled to a nickel for that, but they are entitled to the value a business man would have paid in October of 1943 for this road, with the prospect that the purchasers from the government of that timber in the forest, are going to bring that timber out over this road as long as the charges for doing so are reasonable. That was one of the things that Mr. Abel testified; as the government's witness—his name I don't now recall, testified—he said had he owned this road in October, 1943, he would have expected to haul that timber out of the Upper Humptulips as it was sold by the government to private loggers, he would have expected to haul it out.

"The Court: Of course, Mr. Blair, the fact that they might have expected, would not necessarily make it so.

"The Supreme Court of this state has passed upon a set of facts that are almost identical. I can't give you the case, but it involves a narrow canyon through which the timber of a certain watershed must pass, and of course they held that no consideration must be given to the possibility and the potentiality of the timber being sold or being marketed—being harvested, and that is doubly true, it seems to the Court, in a case

where the Federal Government is the owner of the timber, and they elect not to put any of it on the market for ten or fifteen years, and the realm of speculation continues, and uncertainty, and I think it is an improper element to consider—that is, the taking by the government, and I shall have to hold against you, but I am not going to foreclose you from asking this witness what his opinion is as to the value of the property that has been taken, eliminating a calculation based upon the revenue that might be produced by the cutting and marketing of the government timber, and I shall have to strike his answer upon which he has fixed values, and instruct the jury to disregard it." (R. III, 696-699.)

30. In precluding appellant from proving by its witness McGillicuddy that an owner or prospective purchaser, being informed as to the general situation with respect to the roads and the timber around them, would have given value to the road because purchasers of the timber would pay for the use of the road to remove such timber, as follows:

"Q. Mr. McGillicuddy, in your opinion would an owner or prospective purchaser, being informed of the general situation existing with respect to this road and the timber surrounding it, and in view of the ownership as they existed at that time, have given value to this road for its use in hauling timber to—or its use by permitting others to haul their timber coming out of the Olympic National Forest to the north of this road?

"The Court: That is independent of the government owned timber.

"Mr. Blair: That includes—irrespective of who owned the timber, but in view of the actual ownership at the time. I want him to take into consideration who owned it, the fact that the government did own substantially all of it, and answer whether in his opinion the buyer and seller would have given value to the road for hiring the road out to purchasers of that timber to remove their timber over the road.

"The Court: I will sustain the objection." (R. III, 699-700.)

31. In denying appellant's offer of proof by its witness McGillicuddy, as follows:

"Mr. Blair: . . . We offer to prove by the witness McGillicuddy that an informed person, being in the position of either a prospective buyer or a prospective seller of the property under condemnation here, would have dealt on October 22, 1943, for this property, reasonably expecting that the timber in the Olympic National Forest to the north, to the extent of approximately one billion five hundred million feet would in the ordinary and normal course be brought out of that forest, using this road as one of the links to transport it from the forest to market; that they would have reasonably dealt on the expectation that that timber is to be logged at the rate of approximately twenty million feet per year; that in determining and arriving finally at a price between them, they would have given consideration to the practicability and probability of the timber coming out

over this road, and would have further given consideration to the fact that it is possible to remove that timber by other routes, primarily by a route extending westerly from—or easterly from Public Highway No. 101, which goes through the Olympic Forest, which route would have been more expensive to construct and more expensive to operate over, and that such an informed buyer and seller would have been affected, and their negotiations would have given consideration to the probability that as long as the toll charges or rental charges for the use of this road was reasonable, that this road would have been used for the removal of that timber in the ordinary course of human experience.

"Mr. Keenan: That is objected to, Your Honor, as being incompetent, irrelevant and—

"The Court: Objection will be sustained, and exception allowed." (R. III, 701-702.)

32. In refusing to permit appellant's witness McGillicuddy to testify as to his opinion as to the market value of the roads taken, giving consideration to the seventy million feet of timber owned by Polson Logging Company and others, but excluding the government owned timber, as follows:

"Q. Mr. McGillicuddy, assuming there were upward of seventy million feet of timber owned by others than the United States Government lying in the territory of the sections to the north of lands through which this road passes, and in the Olympic National Forest, would you advise

your client owning the tree farm there to pay the reproduction cost of that road?

"Mr. Keenan: That is objected to, Your Honor. He is talking now of privately owned timber—is that right?

"Mr. Blair: Yes, sir.

"Mr. Keenan: Which is not in the Polson ownership.

"Mr. Blair: Part of it is.

"Mr. Keenan: If it isn't all in Polson's ownership and shown here, the question is objected to. In other words, it is to speculate, and too remote when that timber would come out. They don't have to use this road. It is purely speculative.

"The Court: I am inclined to believe that it is in the realm of speculation, as to the timber that is owned by the Respondent, and of course they would know when they want to move it, and of course if some showing were made that plans were under way to move this other private timber, at or about the time this land was taken. There has been no such showing, as I recall.

"Mr. Blair: No, there is no such showing of that kind.

"The Court: So I shall sustain the objection to the question in the form it is asked, but not depriving you from reframing your question to include any timber that the Polson Logging Company actually owned or controlled that they

planned on moving over this road." (R. III, 715-716.)

33. In refusing to permit appellant's witness Frank D. Hobe, after he had testified that an informed owner and prospective buyer negotiating for the sale of the roads taken by the government would give consideration to the government owned timber in the Olympic National Forest and that that consideration would have influenced the market value of the roads and that he had formed an opinion as to its fair cash market value (R. III, 727-728), to testify as to such value, as follows:

"Q. And now, giving consideration to all of those factors, Mr. Hobe, including the factors that you previously testified to would be considered by that buyer and by that seller, what in your opinion was that fair, cash market value?

"Mr. Keenan: Now, if Your Honor please, that question is objected to on the ground the witness is being asked what his opinion is on fair, cash market value, giving consideration to the government owned timber to the north of this property.

"Mr. Blair: That is right.

"Mr. Keenan: It is identically the same situation we had yesterday afternoon with Mr. McGillicuddy.

"The Court: Yes.

"Mr. Blair: Yes, if the witness answers, he will have given consideration to those factors.

"The Court: I shall have to sustain the objection, and the objection does not go to his qualifications as an expert to express an opinion." (R. III, 727-728.)

and again:

"Q. (By Mr. Blair) Mr. Hobe, considering the Olympic National Forest timber to the north and all other elements that in your opinion would enter into the question of fair cash market value between an informed buyer and seller, what in your opinion was the fair cash market value of the property on October 22, 1943?

"Mr. Keenan: Objected to.

"The Court: Objection will be sustained, exception allowed." (R. III, 747.)

34. In refusing to permit appellant's witness Hobe to give his opinion as to the fair cash market value of the property taken without consideration of the government owned timber in the Olympic National Forest, as follows:

"Q. Now, Mr. Hobe, have you also considered the fair, cash market value, as the value that would be arrived at between that informed buyer and informed seller, as on October 22, 1943, without giving any regard or consideration to the timber that is in the Olympic National Forest and owned by the United States?

"A. I have.

* * *

"Q. Will you now tell the jury, Mr. Hobe, what the fair, cash market value was as of that date, without giving any consideration on the part of either the buyer or the seller to the timber that is in the Olympic National Forest, and owned by the United States, but giving consideration to all other factors that would have been considered.

"Mr. Keenan: If the Court please, that is objected to, because now the witness has—or the question would exclude from the witness' mind the national forest timber, but it would include other timber which is privately owned, and which is also speculative.

"The Court: I think that is correct. The Court will sustain the objection to the question in the form it is made." (R. III, 728-729.)

35. In denying appellant's offer of proof of the market value of the roads taken, by its witness Hobe, as follows:

"Mr. Blair: The respondent offers to prove by the witness Hobe that the market value of the property under condemnation, arrived at between an informed buyer and an informed seller, would have been affected by, and they would have given consideration to, among other things, that the road under condemnation provides the best and most practicable route for moving to market approximately one and one-half billion feet of mature timber in the Humptulips watershed area of

the Olympic National Forest; that the Forest Service contemplated and that it was a reasonable expectation, that the annual log production from that portion of the Olympic National Forest in the Humptulips basin, which would normally and in reasonable expectancy—strike the words 'normally' and 'reasonable'—was at the rate of twenty million board feet per year; that there are other routes over which roads could be developed to remove this timber, including a road into the timber from Highway No. 101 to the west at a point northerly of the township line between Township 21 North and 22 North, and running thence easterly, but that this route would be more expensive to construct and to operate over than the road under condemnation; that had the witness given consideration to these factors and to all other factors which in his opinion would be given consideration by such informed buyer and seller, as of October 22, 1943—

"The Court: Is that your offer?

"Mr. Blair: I have just one more phrase, Your Honor—in his opinion, considering all such factors, the fair, cash market value of the property on that date was in the sum of three hundred thousand dollars.

"Mr. Keenan: I object to it, Your Honor, on the grounds that it is incompetent, irrelevant and immaterial, because it takes into consideration the needs of the government and the probable use in the future as a toll road, to exact a toll on timber sold by the United States.

"The Court: The Court sustained the objec-

tion on the grounds broader than yours, Mr. Keenan; that it is contingent, that may or may not happen; that it is remote and speculative, and I therefore shall sustain the objection." (R. III, 751-752.)

36. In refusing to admit in evidence a letter from the Department of Agriculture, Forest Service, over the signature of F. A. Brundage, Acting Regional Forester, dated May 13, 1942, marked for identification Respondent's Exhibit A-14, or at least that portion thereof stating that it is the policy of the Forest Service to log the area of the Olympic National Forest tributary to the roads taken at the rate of twenty million feet a year. (R. III, 751), which offer was objected to and denied, as follows:

"Mr. Keenan: I am going to object to it, Your Honor. It is a discussion of an offer of compromise." (R. III, 750.)

"The Court: This letter, I shall have to sustain the objection to its admission, but it will remain, of course, as a part of the record in the case." (R. III, 752.)

37. In denying appellant's offer to prove by its witness Len Forrest that the United States National Forest Service plan to sell for cutting and removal not less than twenty million feet (per year) of the mature timber in the drainage basin of the Humptulips River immediately north of the lands taken, and to remove that timber by means of these roads,

as follows:

"Mr. Metzger: We offer to prove by the witness Len Forrest who has been sworn, that prior to October 22, 1943, Ira J. Mason, then the Acting —or then the Assistant Regional Forester for the United States National Forest Service, and Mr. F. H. Brundage I think is the man who signed this letter—in any event, the Acting Regional Forester, stated to the officers of the Polson Logging Company on different occasions that the United States National Forest Service planned and proposed to cut and remove—to sell for cutting and removal, not less than twenty million feet of ripe and mature timber in the drainage basin of the Humptulips River lying immediately north of the lands in question in this suit, and to remove that timber by means of those roads. I think that is all.

"The Court: Your offer does not go any farther than that?

"Mr. Metzger: No.

"The Court: That there would be a revenue or a toll charged for the timber hauled out over the road?

"Mr. Metzger: My offer simply goes to the fact as to the rate of removal and the method of removal.

"Mr. Keenan: If the Court please—

"The Court: The offer will be denied and an exception allowed.

"Mr. Metzger: You will allow us an exception?

"The Court: Yes." (R. III, 752-753.)

38. In refusing to admit in evidence the second declaration of taking dated April 21, 1942, exclusive of the fifth paragraph thereof, as follows:

"Mr. Metzger: At this time, Your Honor, we offer in evidence Declaration of Taking, made by Claude R. Wickard, Secretary of Agriculture of the United States, under date of April 21, 1942, and filed in this Court October 22, 1943, exclusive of Paragraph V thereof.

"Mr. Keenan: If the Court please, I think possibly an argument may follow this motion, and should be made outside of the presence of the jury.

"Mr. Metzger: This is an offer of evidence.

"Mr. Keenan: Any offer I think should. I don't understand the Declaration of Taking is admissible in any instance in one of these cases.

"The Court: I don't either.

"Mr. Metzger: I offer it for a statement of it, as an admission by the Government of the purposes for which this land is taken, being required by law to be stated and being stated in the Declaration.

The Court: The offer will be denied and an exception allowed, Mr. Metzger." (R. III, 757.)

39. In refusing to receive in evidence the third declaration of taking dated November 2, 1943, with the exception of Paragraph V thereof, as follows:

> "Mr. Metzger: I offer in evidence the Declaration of Taking executed by Paul H. Appleby as Under Secretary of Agriculture, November 2, 1943, and filed in this Court November 12, 1943, with the exception of Paragraph number V thereof—these two Declarations of Taking.
>
> "The Court: What is Paragraph V?
>
> "Mr. Metzger: V is the one which relates to the amount.
>
> "The Court: Oh.
>
> "Mr. Metzger: The amount of which I am not—
>
> "The Court: The offer will be denied and an exception allowed."
>
> "Mr. Metzger: Yes, you have allowed us an exception?
>
> "The Court: Yes." (R. III, 757-758.)

40. In denying appellant's Motion for a New Trial. (R. II, 290 and 296.)

41. In entering judgment on the verdict. (R. II, 298.)

ARGUMENT

I.

The Proposed Taking Is Unauthorized by the Statutes on Which It Is Predicated

Specifications of Error Nos. 1, 2, 3, 4, 6, 7, 8, 40, and 41

The power of the United States to take private property for public use is not questioned. The authority of the Secretary of Agriculture to exercise that power or to invoke its exercise for the purposes and under the circumstances here involved is challenged and denied.

1. The authority of a particular officer of the United States to exercise the power of eminent domain must be expressly delegated and clearly expressed:

> "The taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed. *Western U. Teleg. Co.* vs. *Pennsylvania R. Co.,* 195 U. S. 540, 569, 49 L. Ed. 312, 322, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Lewis, Em. Dom., 3d ed. Sec. 371; *Springfield* vs. *Connecticut River R. Co.,* 4 Cush. 63, 69-72; *Holyoke Water Power Co.* vs. *Lyman,* 15 Wall. 500, 507, 21 L. ed. 133, 135. *Cf. Richmond* vs. *Southern Bell Teleph. & Teleg. Co.,* 174 U. S. 761, 777, 43 L. Ed. 1162, 1165, 19 Sup. Ct. Rep. 778."
>
> *Delaware L. & W. R. Co.* vs. *Morristown,* 276 U. S. 182, 192, 72 L. ed. 523, 527.

"The power of eminent domain is arbitrary in character and subversive of the right of private property and before it can be exercised by any officer of the Government, its delegation to him must plainly appear and may not be deduced from any ambiguous language or by doubtful inference. Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed."

United States vs. *West Virginia Power Co.,* 33 Fed. Supp. 756, 759 (D. C. W. Va.);

United States vs. *Rowers,* 70 Fed. 758;

United States vs. *A Certain Tract of Land,* 70 Fed. 940.

2. The Act of August 1, 1888, 25 Stat. 357, 40 U.S.C.A. Section 257, does not authorize any officer of the United States to acquire private property for the United States but merely authorizes resort to the power of eminent domain as a means of acquisition where the power or authority to acquire has been duly granted to the particular officer.

Hanson Lumber Co. vs. *United States,* 261 U. S. 581, 67 L. ed. 809;

Barnidge vs. *United States,* 101 Fed. (2) 295 at 297 (CCA 8).

"We recall to mind what it is of which we are in quest. It is whether Congress has sanc-

tioned the condemnation of these lands. There is this distinction to be observed. The Executive may contract for the conveyance of lands to the United States. His authority to so do may be denied and brought in question. If unauthorized to acquire title, he clearly cannot condemn. If, however, he is so authorized, then he may condemn. If Congress appropriates moneys to pay for the lands, this is a sanction of the acquisition."

Dickinson, D. J. in *United States* vs. 458.95 *Acres,* 22 Fed. Supp. 1017 at 1020 (D. C. Penn).

3. The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C.A. Section 258a, providing a procedure for the immediate acquisition of title through the filing of a declaration of taking, does not authorize the exercise of the power of eminent domain but merely prescribes machinery for the speedier exercise of that power.

City of Oakland vs. *United States,*
124 Fed. (2) 959 (CCA 9);

United States vs. 17,280 *Acres,*
47 Fed. Supp. 267 (D. C. Neb.);

United States vs. 76,800 *Acres,*
44 Fed. Supp. 653 (D. C. Ga.).

For an officer of the United States to avail himself of this new machinery, he must have been otherwise

and independently authorized to acquire the property. The Act of February 26, 1931, 40 U.S.C.A. Section 258a, therefore makes it mandatory that a

> "declaration of taking shall contain or have annexed thereto—
>
> "(1) A statement of the authority under which and the public use for which said lands are taken."

Without such statement of authority or if the stated authority is in fact and law no authority, the declaration of taking is wholly ineffective to vest title in the United States and is a nullity.

> *United States* vs. 72 *Acres,* 37 Fed. Supp. 397 (D. C. Cal.) Affirmed 124 Fed. (2) 959 (CCA 9).

> "In granting such a motion (i.e. motion for judgment on a declaraton of taking), the court necessarily has to decide . . . that the taking was duly authorized by law."

> *Puerto Rico Light & Power Co.* vs. *United States,* 131 Fed. (2) 491 at 494 (CCA 1).

4. The Statutes cited and relied on in the First and Second Declarations of Taking grant no authority to acquire.

The statutes relied on and set forth in the first and second declarations of taking filed in this cause do not grant to the Secretary of Agriculture author-

ity to acquire the property sought to be taken in express terms or by implication. They neither authorize acquisition by purchase or in any other manner, nor do they appropriate money to pay for such property. The District Court clearly ruled that under the statutes relied on, the Secretary of Agriculture was without authority to acquire, and consequently, that his declarations of taking were of no effect. (See order of November 12, 1943, R. 75-79.) That ruling acquiesced in by the government by the subsequent filing of a third declaration of taking and a second amended petition in condemnation, became the law of the case binding upon the court and parties.

Except for the different definition or characterization of the property to be taken, the first and second declarations of taking are identical in their statement of the authority relied on as authority to acquire. The first, dated January 8, 1942 and filed January 21, 1943, reads as follows (R. I, 16):

> "1. The Act of Congress approved June 4, 1897, 30 Stat. 34-36, as amended, and the Department of Agriculture Appropriation Act, 1942, (c. 267, 1st Session Pub. Law, 144-77th Congress), authorize me, in the name of the United States of America, to acquire the perpetual easement and right-of-way described in the Condemnation Petition in the above entitled proceeding and set forth hereinbelow."

The second, dated April 21, 1942 but not filed until

tion Act, 1942 (55 Stat. 408) is an appropriation act and nothing more. It, in turn, grants no authority to acquire lands for or in connection with the administration of the national forests. No claim has been or will be made that this act contains any express grant of such authority. No such authority can be implied by any appropriation made by it. *There is no appropriation to pay for these lands.*

The portions of that act, which are in any way germane to the question here involved, are set out in the appendix to this brief.

In the division of that act dealing with and captioned "FOREST ROADS AND TRAILS," appropriation is made "for carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23)."

By definition, the acquisition of rights of way is expressly excluded from the purposes or scope of said Federal Highway Act. Section 2 of that Act (23 U.S.C.A. Section 2) provides:

> "2. DEFINITIONS. When used in this Chapter, unless the context indicates otherwise,
>
> * * * *
>
> "The term 'construction' *means* the supervising, inspecting, actual building and all expenses incidental to the construction of a high-

way, except locating, surveying, mapping and *costs of right of way.*" (Italics ours.)

"When an exclusive definition is intended, the word 'means' is employed."

Roberts, J., in *Groman* vs. *Commissioner,* 302 U. S. 82, 86, 82 L. Ed. 63, 66.

In the division dealing with "FOREST SERVICE" and under the subheading "ACQUISITION OF LANDS FOR NATIONAL FORESTS," appropriation is made "for the acquisition of forest lands under the provisions of the Act approved March 1, 1911, as amended (16 U. S. C. 513-519, 521)." It is not claimed, but, on the contrary, it is disclaimed that the acquisition here sought is under or pursuant to the act (commonly referred to as the "Week's Act"), for the purposes of which said appropriation was made.

Again in the division dealing with "FOREST SERVICE" but under the subheading "SALARIES AND EXPENSES" and in the paragraph headed "National Forest Protection and Management:", there is an appropriation for "the *maintenance* of roads and trails and the *construction and maintenance of* all other improvements necessary for the proper and economical administration, protection, development and use of the National Forests, including experimental areas under Forest Service admin-

istration." No power to acquire a right of way can be implied from or is sanctioned by this appropriation. So far as roads and trails are concerned, the appropriation is limited to their maintenance (i.e. the appropriation is for the maintenance of something already existing and hence previously acquired.)

United States vs. *Threlkeld,* 72 Fed. (2) 464, decided July 28, 1934, held that an appropriation "for the *construction* and maintenance of roads, trails, bridges, fire lanes, telephone lines, cabins, fences and other improvements necessary for the proper and economical administration, protection and development of the forests" sanctioned the acquisition of the rights of way and other lands *within a National Forest* necessary for the construction of the roads and other improvements for which funds were appropriated. That decision was rested upon what is emphasized by the court as a highly significant fact that Congress had for many years made substantial appropriations for the *construction* of roads, trails and other improvements necessary for the administration, protection and development of the forests. The kernel of that decision is found in the following sentence:

> "We think the broad authority to construct and maintain roads and other improvements includes the power to acquire land for the purpose

if it is necessary, because when legislative authority to do a specified thing is conferred, the power to do all things reasonably necessary to its achievement is impliedly granted."

Opinion 72 Fed. (2) at Page 466.

But with that decision and the construction thereby made as to the effect of an appropriation for "construction," the language so emphasized and relied upon disappeared from the Department of Agriculture Appropriation Acts. With the Department of Agriculture Appropriation Act 1936, approved May 17, 1935, 49 Stat. 247, it became stereotyped in the language set out in the appendix hereto, *omitting any appropriation whatsoever for the "construction" of roads and trails.* (See the several Department of Agriculture Appropriation Acts from 1937 to 1944, inclusive, 49 Stat. 1421, 1437; 50 Stat. 395, 411; 52 Stat. 711, 726; 53 Stat. 939, 955; 54 Stat. 532, 546; 55 Stat. 408, 422; 56 Stat. 664, 680; and 57 Stat. 392 at 412.)

If it was significant that in 1933 and for many years prior thereto the Congress had appropriated for the Forest Service moneys for the *construction* and maintenance of roads, trails, bridges and other improvements, it is doubly significant that following a decision of the courts that such appropriation authorized the acquisition by the Secretary of Agricul-

ture of whatever lands he deemed necessary for road construction purposes, the Congress omitted and since that date has continued to omit any appropriation for the *construction* of roads and bridges and has limited its appropriation to the *maintenance of roads and trails* and the *construction and maintenance of all other* necessary improvements. The intent of the Congress to deprive the Secretary of Agriculture of the power to acquire lands, which the Court in the Threlkeld case had held was implicit in an appropriation for "construction," could not have been more clearly manifested.

When a change occurs in legislative language, particularly where the change is in language previously construed by the courts, there is a conclusive presumption that the legislative body intended to change the rule of decision.

> "The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."
>
> *United States* vs. *Bashaw,*
> 50 Fed. 749, 753-4 (CCA 8th).

"When a law that has been construed by the

courts is re-enacted, the re-enactment adopts the construction that the court has placed upon the law. It also is true that when a legislative body amends a law that has been construed by the courts, and changes the language thereof, it intends to change the rule of decision upon the subject."

United States vs. *Southern Pacific Co.,*
230 Fed. 270, 274 (D. C. Cal.)

"A change of legislative purpose is to be presumed from a material change in the wording of a statute."

Lundquist vs. *Lundstrom,*
270 Pac. 696, 697 (D. Ct. App. Cal.)

Wm. Jameson & Co. vs. *Morgenthau,*
307 U. S. 171, 173, 83 L. Ed. 1189, 1192

Whitley vs *Superor Court Los Angeles County,*
113, Pac. (2) 449, 452 (Supm. Ct. Cal.)

Felin vs. *Kyle,*
22 Fed. Supp. 556, 559 (D. C. Penn.)

Stanolind Pipe Line Company vs. *Oklahoma Tax Commission,* 30 Fed. Supp. 131, 137 (D. C. Okla.)

On these grounds, (see Condensed Statement of Testimony R. I, 136-143), the District Court ruled as follows:

> "In view of your statement, Mr. Metzger, I think you may prepare an order, and both agree upon, not dismissing this action, but authorizing the filing of an Amended Declaration of Taking and any deposit that is made will take into consideration the deposit already on hand and the order made upon the original Declaration of Taking, for easement, will be vacated and held for naught and likewise, the Declaration of Taking upon which the order was based, and likewise, the Declaration of Taking which was executed on the 21st day of April, 1942, and filed in this cause the 22nd day of October, 1943, will be held for naught."

and formal order, embodying that ruling, was signed and entered November 12, 1943 (R. I, 75). (See also Court's remarks in the course of the argument R. I, 151, 158, 162, 165 and 166.)

That ruling and order became the law of the case, binding upon the court and the parties. It was so recognized by the trial court (R. I, 149 and 165). It is so as a matter of law.

> "The motion to dismiss the bill was granted unless the plaintiff within twenty days filed an amended bill stating a case for granting equitable relief. No application was made for a rehearing, and no appeal was taken from the decision. The insufficiency of the original complaint thereupon became res judicata in the subsequent proceeding before Judge Van Fleet." (Citing authorities.) *Presidio Mining Co.* vs. *Overton,* 261 Fed. 933, 939 (CCA 9).

> "The general rule is that where a party, after an order sustaining a demurrer to his pleading by leave of court, files an amended pleading, he is deemed to have acquiesced in the action of the court upon the demurrer and will not be permitted to appeal or assign such action as error in the appellate court." 2 *American Jurisprudence, Appeal and Error,* Sec. 207, 927.

To Summarize:

An officer of the United States does not *ex officio* have authority to acquire private property for public use. That authority must be delegated to him by act of Congress. The delegation of such authority must be clearly expressed though it need not be in express terms. It will be implied where there is an appropriation by Congress to pay for the lands sought to be taken. In neither of the statutes relied on in the first and second declarations of taking in this cause is there any such delegation or grant of authority, express or implied. Therefore, each of said declarations was a nullity. The order of the District Court so holding (R. I, 75), unexcepted and acquiesced in, became and is the law of the case.

5. The Statutes cited and relied on in the Third Declaration of Taking grant no authority to acquire.

The additional statutes relied on and set forth in the third declaration of taking filed in the cause grant to the Secretary of Agriculture no authority to

acquire the lands sought to be taken. They wholly fail to provide the authority which is lacking in the statutes originally relied on.

The third declaration of taking (R. I, 82) filed after the order of November 12, 1943, making the first two ineffective for any purpose, stated the authority relied on as authority to acquire as follows:

> "The lands hereinafter described are taken under and in accordance with an Act of Congress approved June 4, 1897 (30 Stat. 34-36), an Act of Congress approved November 9, 1921 (42 Stat. 218), an Act of Congress approved September 5, 1940 (54 Stat. 867), an Act of Congress approved July 12, 1943 (Public Law 129-76th Congress, Chapter 215-1st session), an Act of Congress approved July 13, 1943 (Public Law 146-78th Congress, Chapter 236-1st session), and acts supplementary thereto, and amendatory thereof, and the Department of Agriculture Appropriation Act, 1942 (c. 267, 1st session Pub. Law, 144-77th Congress), which authorize me in the name of the United States of America to acquire the lands described in the condemnation petition in the above-entitled proceeding and set forth hereinbelow."

Nothing need be added to what has already been said regarding the Act of June 4, 1897, which is herein referred to as the National Forest Administration Act, and the Department of Agriculture Appropriation Act, 1942, except to point out that the appropriations made by the latter Act were for the fiscal

year ending June 1942, and with their lapse on that date any authority sought to be implied therefrom terminated.

The other statutes relied on grant no authority to acquire lands.

(a) The Act of November 9, 1921 (42 Stat. 218), being the Federal Highway Act, 23 U.S.C.A. Sections 1 to 25, expressly negatives such authority because, as above pointed out, by definition, in Section 2 of that Act, "costs of rights of way" are expressly excluded from the connotation of the term "construction" as used in that Act.

(b) The Act of September 5, 1940 (54 Stat. 867), section 6 of which is set out in the Appendix hereto, granted no authority to acquire. It was not even an appropriation act. It was "An Act to amend the Federal Aid Act approved July 11, 1916, as amended and supplemented and for other purposes" by increasing the amounts *authorized* to be appropriated. Section 6 of that Act, authorized, *but did not make,* the appropriation of funds for the fiscal years ending June 30, 1942, and June 30, 1943, for the purposes of Section 23 of the Federal Highway Act, which purposes, we repeat, expressly excluded the acquisition of rights of way. Moreover, the years for which such appropriations were authorized had passed and the authorization had lost whatever virtue it may

have had prior to the making and filing of the third declaration of taking.

(c) The Act of July 12, 1942 being the Department of Agriculture Appropriation Act, 1944 (57 Stat. 392), is no more a grant of authority to acquire than the Department of Agriculture Appropriation Act, 1942, discussed above. Its provisions are in the stereotyped language of all the Department of Agriculture Appropriation Acts since that of 1936 and in all material respects are identical in language, though not in amounts, with those of the Appropriation Act of 1942. For the convenience of the Court the germane provisions of that Act are set out in the Appendix.

(d) The Act of July 13, 1943 (57 Stat. 560) does not expressly or by implication authorize the acquisition of lands by any officer of the United States. It grants no authority to the Secertary of Agriculture; he is not named or referred to therein.

Section 1 of that Act, which is set out in the Appendix hereto, amends the definition of the term "construction" in Section 2 of the Federal Highway Act approved November 9, 1921, to include "the costs of rights of way incidental to the construction of a highway, except locating, surveying, and mapping." This amendment, made after the passage and approval of the Department of Agriculture Appropri-

ation Act, 1944, cannot be read into that Appropriation Act so as to extend the appropriations made by the earlier Act to purposes not then authorized. Authority to acquire cannot be implied, and acquisition is not sanctioned by congressional appropriation for purposes which at the time of appropriation excluded "costs (and hence acquisition) of rights of way," because Congress, after making the appropriation for specific purposes changed the definitions in the Federal Highway Act and thereby enlarged its purposes.

The argument made on behalf of the United States appears to be that because the Federal Highway Act was amended after the passage and approval of the Department of Agriculture Appropriation Act, 1944, so that the term "construction" thereafter included "costs of rights of way," the appropriation in the Appropriation Act previously passed and approved, which was for the purposes of Section 23 of the Federal Highway Act, was thereby amended so as to be an appropriation for the enlarged purposes of the subsequently amended Highway Act. The fallacy of this argument was recognized by the District Court. (R. I, 157.)

The appropriation for the purposes of Section 23 of the Federal Highway Act was for those purposes, and those purposes only, which were within the scope

of the Highway Act as it read at the time the Appropriation Act became law. That appropriation was not and could not be broadened by the subsequent amendment of the Highway Act. Subsequent legislation cannot be a controlling factor in the construction of prior statutes, which must speak from their own date. *Grahl* vs. *U. S.,* 261 Fed. 487, 492 (CCA 7th). A statute must be construed as of the date of its passage. *Empire Voting Machine Co.* vs. *Chicago,* 267 Fed. 162, 168 (CCA 7th), Cert. Dend. 254 U. S. 462, 65 L. ed. 453.

The Supreme Court of the United States, in *Hassett* vs. *Welch,* 303 U. S. 303, 314, 82 L. ed. 858, 866, quotes 2 Lewis's Sutherland, Statutory Construction, 2nd Edition, pp. 787, 788, as a well-settled canon, as follows:

> "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisons adopted had been incorporated bodily into the adopting statute . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."

> "The adoption in a local law of the provisions of a general law does not carry with it the adoption of changes afterwards made in the general law. This was so ruled in *Kendall* vs. *United*

States, 37 U. S. 12 Pet. 524, 625, 9 L. ed. 1181, 1221."

In re Heath
144 U. S. 92, 94, 36 L. ed. 358, 359.

"It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating act remains intact and 'no subsequent legislation has ever been supposed to affect it'."

U. S. vs. *Mercur Corporation,*
83 Fed. (2d) 178, 180, (C. C. A. 2),
Per Augustus N. Hand, J.

50 *Amer. Juris., Statutes, Sec.* 39, p. 58.

Munoz vs. *Porto Rico Ry. Light & P. Co.,*
83 Fed. (2d) 262, at 266, (C. C. A. 1).

McLeod, Commissioner vs. *Commercial National Bank,* 178 S. W. (2d) 496, 497.

No authority to acquire private property having been granted to the Secretary of Agriculture, either expressly or by necessary implication, by the additional statutes relied on as such authority in the third declaration of taking filed November 12, 1943, appellant's motions to quash and adjudge the same null and void (R. I, 86, II, 250, and 331-2) should have been granted. *U. S.* vs. 72 *Acres,* 37 Fed. Supp. 297 (D. C. Cal.), Aff'd 124 Fed. (2d) 959 (CCA 9);

Puerto Rico Light & Power Co. vs. *U. S.,* 131 Fed. (2) 491 (CCA 1).

A. TAKING OF THE SO-CALLED "GRAVEL LANDS" IS IN ANY EVENT NOT AUTHORIZED

Specifications of Error Nos. 3, 4, 8, 26 and 40

Obviously, Appellant's general proposition that the proposed taking was wholly unauthorized includes this subsidiary proposition. If, however, it should by any chance be held that under one or more of the statutes relied on authority has been granted to the Secretary of Agriculture to acquire rights of way for roads, it does not follow that authority has been granted thereby to acquire other lands outside the Olympic National Forest which are sought to be acquired for purposes other than as rights of way.

Such authority cannot be predicated upon the appropriation "for maintenance of roads and trails." Such an appropriation is not one to pay for lands from which maintenance materials may be obtained. Conceding that "when legislative authority to do a specific thing is conferred, the power to do all things reasonably necessary to its achievement is impliedly granted," it does not follow that an appropriation to pay costs of maintenance sanctions the acquisition of private property from which gravel or other materials useful or desirable in effecting the authorized

maintenance may be obtained. Such an appropriation would not sanction the taking of an asphalt lake or crude oil and oil refining plant in California merely because the asphalt or oil produced therefrom might be used or useful in maintaining roads in the Olympic National Forest in Washington, or the taking of a limestone quarry or cement manufacturing plant for a similar reason. Such a holding is not within the rule that an appropriation to pay for lands sanctions the acquisition thereof. *U. S.* vs. 458.95 *Acres,* 22 Fed. Supp. 1017, at 1020. It runs counter to the rule that the grant of authority to acquire must be clearly expressed. *Delaware L. & W. R. R. Co.* vs. *Morristown,* 276 U. S. 182, 72 L. ed. 523. Such a holding involves a double implication: First, that ownership of lands wherever found, from which road maintenance materials may be derived is necessary to maintain the roads, and then that the acquisition of such lands is sanctioned by an appropriation to pay costs of maintenance. Roads cannot be *constructed* without the rights of way on which to build them, but once built may be *maintained,* and in many if not the majority of cases are *maintained,* without ownership of the lands or other facilities from which the maintenance materials are derived or produced.

Furthermore, under the evidence, the taking of these lands was wholly unauthorized. They lie out-

side the boundaries of the Olympic National Forest. According to the Government witness, they were useful only for growing trees (R. II, 495; III, 534 and 536). They are within a part of the area certified as the Polson Tree Farm. Congress alone may make additions to the Olympic National Forest. 16 U. S. C. A. Sec. 471(a). The acquisition of 100 acres of land contiguous to but wholly outside of the Olympic National Forest and useful only for growing trees can be nothing but an addition to that forest.

At the conclusion of the Government's case, appellant moved to dismiss the action as to these lands on the ground that the taking was not for any authorized purpose but merely to enlarge the boundaries of the Olympic National Forest (R. III, 537, Specification of Error No. 25).

The trial court indicated doubt as to what his ruling should be (R. III, 538-540); whereupon the Government asked and obtained leave to reopen its case. The only testimony then offered was that of Paul H. Logan (R. III, 567-568) to the effect that subsequent to his previous testimony he had examined the records in the Regional Office of the Forest Service at Portland to prepare himself to testify as to the *purpose* for which Tracts 2 and 3 were taken, and that purpose was to obtain gravel there "for the construction and maintenance of roads

in the West Fork of the Humptulips area." The Government offered no testimony that these lands are gravel-bearing or that they will serve the purpose for which it is alleged they are taken.

It is submitted that the express congressional prohibition against additions to the Olympic National Forest cannot be circumvented by the *ipse dixit* of the Secretary of Agriculture or of the United States Forest Service that forest lands are being acquired for the gravel which they may or may not contain.

B. and C. CONFIRMATION OR VALIDATION OF POSSESSION TAKEN PRIOR TO NOVEMBER 12, 1943, WAS ERRONEOUS

Specification of Error Nos. 5 and 40

As previously stated, the District Court, on November 12, 1943, entered its order adjudging the first and second declarations of taking without authority and of no effect and dismissing the original and amended petition in condemnation (R. I, 75). The Government acquiesced in that ruling and thereafter, but on the same day filed the third declaration of taking (R. I, 82), and later, on May 23, 1944, a second amended petition in condemnation (R. I, 92). The order of November 12, 1943, was entered in the July 1943 term of the District Court.

Appellant moved against the third declaration

of taking on the ground that the Secretary of Agriculture was without authority to acquire the lands sought to be taken (R. I, 86). That motion was denied and the Government's motion for judgment on said declaration of taking granted by order made and entered May 23, 1944, which was in the following, or February 1944, term of the District Court (R. I, 99). Paragraph (4) of that Order is as follows:

> "(4) The Court on its own motion, and after due consideration, further Orders, Adjudges and Decrees that the order of this Court entered herein on November 12, 1943, be and the same is hereby modified by vacating and setting aside any and all parts of said order which may be interpreted as denying the authority of the Secretary of Agriculture to condemn land in the manner and for the purposes set forth in the original and amended petitions in condemnation on file herein at the time of entry of said order."

The judgment on the declaration of taking entered pursuant thereto (R. I, 108), among other things, provided as follows:

> "It is further Adjudged that the possession taken by the petitioner, United States of America on or about February 5th, 1942 of that portion of the above described property which is described in the original petition in condemnation and declaration of taking filed herein on January 21, 1942, and taken pursuant to the judgment on said declaration of taking entered herein on January 23, 1942, be and the same is hereby confirmed as of the date such possession was taken; and pos-

session of the remainder of the property above described or any portion thereof not heretofore taken by the petitioner, is hereby granted as of the date of this judgment."

The Government, if it had deemed the District Court's order of November 12, 1943, erroneous, could have stood thereon, suffered the action to be dismissed, and appealed to this court. It did not do so, nor did it at any time move to vacate, set aside or in any way amend said order. That order, through lapse of time and the ending of the July 1943 term of the District Court, became final, so that the District Court was *without jurisdiction* on May 23, 1944, more than six months later, to set aside, modify or correct it.

Bronson vs. *Schulten,*
104 U. S. 410, 26 L. ed. 797;

Hazel Atlas Glass Co. vs. *Hartford Empire Company,* 320 U. S. 732, 88 L. ed. 433.

Compare Rule 60 of *Rules of Civil Procedure.*

But, passing the question of jurisdiction, the ruling embodied in that order became the law of the case and *res judicata* as to the insufficiency of the first and second declarations of taking.

Presidio Mining Co. vs. *Overton,*
261 Fed. 933, at 939 (CCA 9th);

2 *Amer. Juris. Appeal & Error,*
Sec. 207, p. 972.

Moreover, in view of the rulings and orders of the District Court, the Government, by filing the third declaration of taking, must be conclusively presumed to have waived or abandoned the earlier declarations and to be relying on the third and last declaration of taking filed.

The letter of the Under Secretary of Agriculture transmitting the third declaration of taking to the Attorney General for filing, states:

> "The enclosed declaration of taking is submitted for use in lieu of the declaration of taking forwarded to you with my letter of April 21, 1942."

The original petition in condemnation filed January 21, 1942 (R. I, 2) and the amended petition in condemnation filed October 22, 1943, were dismissed by order of the District Court dated November 12, 1943 (R. I, 75, 78) "but without prejudice to the filing of a new or amended petition herein." That order of dismissal was never vacated, set aside or in any way modified, but pursuant thereto a second amended petition in condemnation was filed May 23, 1944 (R. I, 92), paragraph VI of which alleges the filing of the third declaration of taking but makes no reference to the earlier declarations.

Such waiver or abandonment was confirmed subsequent to May 23, 1944. On September 18, 1945, the Government moved to amend the third declaration of taking and all subsequent pleadings to correct the description of Line F (R. II, 242). The motion was granted by order entered September 20, 1945 (R. II, 246). Neither the motion nor the order referred or in any way related to either the first declaration of taking (R. I, 16), which, however, did not cover Line F, or the second declaration of taking (R. I, 60), which has the same erroneous description as was contained in the third declaration prior to its amendment. The case proceeded to trial on the second amended petition in condemnation as so amended and Appellant's answer thereto (R. II, 259). On the trial, the Government offered no evidence as to the date possession was taken, notwithstanding the allegations of its second amended petition relative thereto were denied by Appellant's answer and notwithstanding those allegations were *prima facie* and patently erroneous.

The original declaration of taking related to a *non-exclusive easement* only. Such possession as was taken under that declaration, if any, was therefore not exclusive of Appellant, for it will not be presumed that the Government trespassed beyond the rights asserted in that declaration. Further, the original declaration covered only a portion of the

lands covered by the second declaration of taking. It did not cover Lines H, I, J, K, F and L, nor Tracts L, 2 and 3, as will be readily apparent by comparison of the maps attached to said declarations (R. I, 19 and 63.

No judgment was ever entered on the second declaration of taking but it was held "unauthorized and insufficient to vest title in the United States of America to any of the lands or property therein described and . . . . of no effect whatsoever," by order entered November 12, 1943 (R. I, 77). This second declaration of taking was superseded by a third declaration of taking which was filed "in lieu" of the second, on November 12, 1943, but no judgment on the third declaration was entered until May 23, 1944. (R. I, 108.)

Under the Act of February 26, 1931 (46 Stat. 1421, 40 U. S. C. A. 258(a), if the taking was authorized by the statutes cited in the third declaration, title to the lands described therein vested in the United States upon its filing, to-wit, on November 12, 1943, *and not before.*

That Act provides:

> "Upon the filing of a declaration of taking, the Court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner."

Under that provision the Court cannot require the appellant, as the party in possession, to surrender possession prior to the filing of the declaration of taking (in this case prior to November 12, 1943), nor confirm a possesion adversely taken or asserted prior thereto. The judgment on the declaration of taking entered May 23, 1944 (R. I, 108) was therefore in any event erroneous in so far as it purports to confirm as of the date of the taking thereof whatever possession was taken prior to May 23, 1944, but without fixing the date or dates or defining the property involved (R. I, 112), since the effect thereof is to deprive Appellant of its property, i.e., its right to possession and the fruits thereof, without due process of law in violation of the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States and of the Ninth Amendment to the Constitution of the State of Washington.

In this connection, brief reference should be made to Specifications of Error 9 and 10, which challenge the District Court's order and instruction fixing the date of taking, and consequentially the date of valuation, as of October 22, 1943, the date of the filing of the second declaration of taking.

It is submitted that for the reasons and on the authorities hereinbefore presented, there was no

valid or effective taking of appellant's property; but if there were, it was not, and under the record here made could not have been, until the filing of the third declaration of taking on November 12, 1943. In either event, Specifications of Error 9 and 10 are well taken and should be sustained.

II.

A. DETERMINATION OF JUST COMPENSATION INCLUDES CONSIDERATION OF THE USE FOR WHICH THE PROPERTY IS TAKEN

Specifications of Error 11, 12, 13, 14, 15, 16, 17, 19, 23, 25, and 39

Appellant concedes that value to the condemner of the use for which the property is taken is not the test, or a test, of just compensation.

The value to the Government of the use of the roads taken will be reflected in and measured by the increased value of or increased stumpage prices received for its timber which will be taken out over these roads. Appellant made no attempt to prove any such value and makes no contention here that it had the right and should have been permitted to do so.

On the other hand, Apellant believes the rule to be unquestioned and indisputable that if the property condemned is at the time of taking available or adaptable for the use for which taken, then that fact

may be shown and taken into account and if that fact would increase the price negotiated between a willing buyer and a willing seller, then such use and the value attributable thereto are to be considered in determining just compensation.

Such is the rule in the Federal courts:

Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 403, 25 L. Ed. 206;

United States vs. Chandler Dunbar Water Power Company, 229 U. S. 53, 57 L. Ed. 1063;

Olson vs. U. S., 292 U. S. 246, 255, 78 L. Ed. 1236;

Washington Water Power Co. vs. United States, 135 Fed. (2d) 541 (C. C. A. 9);

United States vs. Waterhouse, 132 Fed. (2d) 699 (C. C. A. 9);

Great Falls Manufacturing Company vs. United States, 16 Ct. Cl., 160, 198; affirmed *U. S. vs. Great Falls Manufacturing Co.,* 112 U. S. 464, 28 L. Ed. 846.

It is the rule in the State of Washington:

Columbia and Cowlitz River Boom and Rafting Company vs. Hutchinson, 56 Wash. 323, 105 Pac. 636;

Ham, Yearsley & Ryrie vs. Northern Pacific Railway Company, 107 Wash. 378, 181 Pac. 898.

It is the rule generally:

San Diego Land & Town Company vs. Neale, 78 Cal. 63, 20 Pac. 372, 88 Cal. 50, 25 Pac. 977;

Emmons vs. Utilities Power Company, 83 N. H. 181, 141 Atl. 65;

Oregon Railway and Navigation Company vs. Taffe, 67 Ore. 102, 134 Pac. 1024, 135 Pac. 332;

Nantahala Power & Light Co. vs. Moss, 17 S. E. (2d) 10;

Decatur Park District vs. Becker, 368 Ill. 442, 14 N. E. (2d) 490, 493;

Shurtleff vs. Salt Lake City, 96 Utah 21, 82 Pac. (2d) 561, 564.

In *Mississippi & Rum River Boom Co. vs. Patterson,* 98 U. S. 403, 25 L. Ed. 206, plaintiff in error was a corporation created under the laws of Minnesota to construct booms for the holding and rafting of logs on the Mississippi and Rum Rivers. It

sought to acquire by condemnation for booming purposes three islands in the Mississippi River, the position of which "specially fitted them, in connection with the West bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty million feet of logs." The issue before the Supreme Court was the compensation to be made to the owner. Mr. Justice Field, speaking for the unanimous court, said:

> ". . . as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.
>
> "The position of the three islands in the Mississippi fitted them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditure of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." (Opin. p. 209.)

In *United States vs. Chandler-Dunbar Water Power Company,* 229 U. S. 53, 57 L. Ed. 1063, the

United States sought to acquire certain lands for the construction of a ship canal. It took exception to the inclusion as an element of value of the availability of the land taken for lock and canal purposes. The Supreme Court overruled that exception, saying:

> "The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such purpose."

In the *Columbia and Cowlitz River Boom and Rafting Company* case, 56 Wash. 323, 105 Pac. 636, the Booming Company sought to condemn certain lands necessary for their booming and rafting operations. The principle issue before the Supreme Court of the State was a claim of excessive compensation, appellant claiming the trial court had erroneously instructed the jury that in making up their

verdict they could take into consideration the value of respondent's premises as a boom site, i.e., their value for the purpose for which they were being acquired. Judgment was affirmed, the Supreme Court saying:

> "Whether the verdict was in fact excessive is a more difficult question. Based upon the value of the land for agricultural purposes, it could not be justified under the most favorable view of the evidence. But the land was valuable as a boom site, and the jury had the right to take that fact into consideration in making up their verdict; and in viewing the verdict in the light of such fact we are unable to say it is excessive. . . .
>
> "The instruction of the court given in this case, to the effect that the jury in making up their verdict could take into consideration the value of respondents' premises as a boom site, does not conflict with the rule announced by this court in the case of *Grays Harbor Boom Co. vs. Lownsdale,* 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267."

In *Ham, Yearsley & Ryrie vs. Northern Pacific Railway Company,* 107 Wash. 378, 181 Pac. 898, plaintiff sought to condemn for the construction and maintenance of a dam site certain lands previously acquired for public purposes by the Railway Company. Instruction number six given by the Court was:

> "In estimating the value of the real estate

you may consider all of its capabilities and all of the uses to which it is applied, and for which it is adapted, but you shall not consider the fact, if you find such fact to be, of the unwillingness of the owner to sell or dispose of said property."

Cf. District Court's Instructions, R. III, 763, 764.

The Trial Court then further instructed the jury, instruction number seven:

". . . that, in ascertaining the value of damage, they 'must not take into consideration any special value which said property may have to the petitioner by reason of its necessity, but the market value as hereinbefore defined to you; nor should you take into consideration the value of defendants' property as a dam site'."

Compare District Court's instructions here, as follows:

"Potential uses of this property can not be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of the property is for truck or road purposes, then you will take into consideration the wants or needs as such may reasonably be expected in the near future by those who would make use of this property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question." (R. III, 763-764)

and again:

> "And in that connection, I instruct you again, as I have heretofore, and probably shall further, that when the uses of this property was taken into consideration by the prospective buyer and prospective seller, those uses can not include any earnings that the property may make by reason of having transported thereover any timber that grows in the national forest that may be contiguous to it, or within the watershed." (R. 766-767)

and again:

> ". . . Any special value that the road may have to the government for use in connection with its national forest must be excluded by you as an element of market value. The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move." (R. III, 768)

In the Washington case, appellant assigned error on the giving of Instruction number seven, which assignment was sustained, the court saying:

> "In instruction number seven the respondent insists that the trial court adhered to the rule which held to the market value for all purposes, and clearly, specially and unmistakably told the

> jury that, in their determination of the land, they could consider its adaptability for a dam site. This is certainly not correct when we find in the instruction that the court told the jury they were not to take into consideration the value of the land for a dam site."

then, after citing and quoting from Boom Company vs. Patterson, 98 U. S. 403, supra, Lewis on Eminent Domain, 10 R. C. L. Eminent Domain, Par. 114, concluded as follows:

> "It is true that the owner is not permitted to take advantage of the necessities of the condemning party, but neither can the condemner obtain something of value for nothing. Under the rule fixing the market value at the time of taking, obtaining in this state, and in determining that value, it is proper to show the condition of the property, its surroundings, the uses to which it has been applied, and its capacity for other uses, including that to which it is sought to be applied, in estimating its value, but no showing may be made of its value for any special use; the value of the use for which it is sought may be more or less than its market value." Opin. 107 Wash. 383, 389.

In ruling in a similar situation, the Supreme Court of New Hampshire, in *Emmons vs. Utilities Power Company,* 83 N. H. 181, 141 Atl. 65, said:

> "In the ascertainment of the value of the property invaded, she (the land owner) is entitled to have it appraised for the most profitable purpose, or advantageous use, to which it could be

put on the day it was taken. (Citing cases.) It appears to be conceded that flowage is the most profitable use to which the plaintiff's property can be put.

"There is no rule of law that the value of land taken by eminent domain is measured solely by its capacity for valuable uses in and of itself without regard to such external elements, if any, as would probably have affected the judgment of a purchaser at a fairly conducted sale." (Opin. 414 Atl. p. 67)

In *Decatur Park District vs. Becker,* 14 N. E. (2) 490, the Supreme Court of Illinois said:

"The value of the land taken to the party taking it, is not the test of what should be paid. If, however, entirely apart from the fact that the property was taken for a particular use, it appears that it was exceptionally adapted and available for such use, and the necessity for such use was so imminent as to add something to the present value in the minds of possible buyers, that element may be considered in determining the fair cash market value." (Opin. p. 493.)

Demonstration that the appellant is entitled to the benefit of this rule and that the District Court erred to appellant's prejudice in not recognizing or in misapplying it, requires a somewhat more detailed statement of the facts.

With the exception of Tracts 2 and 3 comprising 100 acres, the lands involved in this case (which for

convenience of designation are sometimes referred to as the "lands taken" or the "roads taken" without intending thereby to imply or admit that the "taking" was valid or effective for any purpose) consist of road rights of way with the highly improved auto truck roads constructed by or for the account of Polson Logging Company thereon. These roads are designated on the maps attached to the third declaration of taking (R. I, 63) as Lines A, B, C, D, H, I, J, K, F, and L. As shown on said maps and on Exhibits 1 and 2 and A2, the principal road system extends from a junction with U. S. Highway 101 in Section 35, Township 21 North, Range 10 West, Willamette Meridian, northerly across that township and Township 21 North, Range 9 West, Willamette Meridian, following up the valley of the West Fork of the Humptulips River to the south line of the Olympic National Forest, which they tap at five different points in Sections 2, 3 and 5 of Township 21 North, Range 9 West. In addition, there is a short section of road, Lines F and L, which, although actually connected with the main system, may for present purposes be treated as independent thereof since the Government has not sought to acquire or take the intervening or connecting road. This short section of road extends from a junction with U. S. Highway 101 in Section 11, Township 21 North, Range 10 West, Willamette

Meridian, eastwardly to the boundary of the Olympic National Forest on the west line of Section 6, Township 21 North, Range 9 West.

There are 15.53 miles of these roads (R. II, 347-350) inclusive of the portion that crosses the state-owned school section (Section 16, Township 21 North, Range 9 West), but exclusive of the roads on and crossing Tracks 2 and 3 which extend to and tap the Olympic National Forest in Section 4, Township 21 North, Range 9 West, and also connect Lines J and K. The greater part of these roads had been originally constructed and for many years used as logging railroads. Later, and prior to any purported taking by the Government, they had been converted into truck roads by the removal of the railroad rails and ties and ballasting and surfacing with gravel. Having been originally constructed as railroad grades, the maximum curvature was 10 degrees (R. III, 598) and the grade from the northern termini to the junction with U. S. Highway 101 (the hard-surfaced arterial highway leading to Grays Harbor and market) was all down-grade with a maximum gradient of .5%, except for a 2% adverse grade for about 2000 feet west of the bridge crossing the West Fork of the Humptulips River (R. III, 597). Thus they constitute a nearly ideal system of truck logging roads, not only for the logging and removal of any timber remaining or hereafter grown upon the

lands which they traverse, but for the logging and removal of the timber in the Olympic National Forest to the north, which will be drained down or funnelled out over these roads as naturally as the surface waters in that area of the National Forest are drained by the West Fork of the Humptulips River and its tributaries which these roads follow. (See Exhibits 1 and 2 and A2.) The estimated cost to reproduce new these roads, exclusive of the portion crossing school section 16 and the bridges over Stevens and O'Brien Creeks, as of the date of valuation fixed by the Court, was $214,647.23 (R. III, 682) and the estimated accrued depreciation to that date was $20,632.85 (R. III, 690). The bridges over Stevens and O'Brien Creeks were not included in these estimates because the United States Forest Service had subsequent to October 22, 1943, elected to replace the former with a new bridge and the latter with a culvert and extensive fill.

In the portion of the Olympic National Forest which lies immediately north of the townships traversed by these roads and which is known as the Humptulips Basin or, in Forest Service parlance, as the Humptulips Working Circle, there is a large stand of mature timber conservatively estimated by Lester M. Edge, Logging Engineer for the Olympic National Forest, at from one billion to one billion four hundred million feet (R. II, 375), and by others

at even larger amounts. It is "the last stand of virgin timber that can feed Grays Harbor." (W. H. Abel, R. II, 472.) It is the body of timber that will be tapped by these roads, and the quantity that the Government's Logging Engineer Edge, after examing the roads "with the idea in mind to transport timber from the Olympic National Forest on the north to the main Olympic Highway (R. II, 355), figures will come out over them.

From 1939 to October or November, 1943, the use of these roads or portions of them was hired from Appellant by the M. & D. Timber Company, and Messrs. McKay, Johnson, and perhaps others, for the transportation and removal of logs, both government and privately owned, cut by them on lands within the National Forest, and of timber owned by third parties on lands tributary to those roads but outside the Forest.

These roads, beyond question were adaptable and available for the removal of the timber in that Forest. That was admitted by the Court and conceded by the Government (R. III, 629, 630) and implicit in the Court's instructions to the jury (R. III, 768). It was reasonably probable that the timber in the Olympic National Forest would move out over and by means of these roads. See Testimony of Government's witnesses Logan (R. II, 500-504) and Abel (R. II, 472-478).

Fundamentally, then, the Court erred to the prejudice of appellant in ruling "that what timber there is in this National Forest that is contiguous to this—and moves out over the road, cannot be a factor in fixing market value of the road," (R. III, 672) (cf. Specification of Error 18), and in instructting the jury as follows:

> "Potential uses of this property cannot be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of this property is for truck or road purposes, then you will take into consideration the wants or needs as such may reasonably be expected in the near future by those who would make use of this property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question." (R. III, 764)

> "The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move." (R. III, 768)

> "You can allow only such value for the lands

taken which you believe a private purchaser, acting as a reasonably prudent person, and being an informed man, would pay for it, knowing that he could not anticipate any earnings or revenues that he might derive by reason of the national forest timber which is in the Humptulips Watershed." (R. III, 768)

(Cf. Specifications of Error 14, 16 and 17.)

It is implicit in that ruling and those instructions that the roads taken were available and adaptable for the removal of a billion feet and more of timber in the National Forest and that that timber would "*necessarily*" move out over these roads and that a prospective purchaser would pay an increased price because of those facts.

Such instructions required the jury to determine compensation without consideration of the highest and best use to which the lands taken could be put. They violate every element of the rule above set out as to the matters to be considered in determining just compensation.

This highly prejudicial error is pointed up by the testimony of the Government's witnesses LaSalle (R. II, 444), Abel (R. II, 466), Logan (R. II, 508), and Porteous (R. II, 517), all to the effect that in placing a value on the property taken they ignored the fact that it was a truck logging road and wholly disregarded the use to which the Government in-

tended to put it.

It is further pointed up by the fact that appellant's witness Hobe, whose qualifications as an expert witness on market value were not questioned (R. III, 728), after testifying that an owner willing, but not compelled, to sell, and a buyer willing, but not compelled, to buy, in negotiating for the sale of the property taken would have given consideration to the Government owned timber in the Olympic National Forest to the north of the roads and that that consideration would have influenced the market value of the roads under condemnation (R. III, 725, 726), was not permitted to state his opinion as to market value because it took into consideration the very factors which would have been given weight by a hypothetical buyer and seller and would have influenced the market value (R. III, 727, 728) (Cf. Specification of Error 33).

As put by this Court in *Washington Water Power Company vs. U. S.*, 135 Fed. (2d) 541, at 543:

> "Accordingly the rule is that a witness may base his appraisal on the 'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future' . . .
>
> "This simply means that if it was 'reasonably probable' that the land would be used for the use testified to, evidence of its value for such

use is admissible, but if not, then the evidence is inadmissible."

(Cf. U. S. vs. Waterhouse, 132 Fed. (2d) 699, at 703 (C. C. A. 9.)

The District Court not only violated and disregarded the rule that if it was reasonably probable that the land would be used for the purpose for which it was taken then such use and the value attributable thereto are to be considered in determining just compensation, but exaggerated that error and committed further error by refusing evidence offered by the appellant to show (1) that the roads taken were available and adaptable for the purpose for which taken, to-wit, the removal of timber from the Olympic National Forest; (2) that it was reasonably probable that the roads taken would be used for that purpose, and (3) the market value attributable to such use.

If under the declaration of taking and the evidence of the Government's witnesses it was reasonably probable that the roads taken would be used for the removal of timber from the National Forest, which fact was, as hereinabove pointed out, assumed and admitted by the District Court and in part, of not wholly, conceded by the Government, then it was error to reject appellant's proffered testimony of market value which took into consideration the value attributable to that use and it was further error to in-

struct the jury that in determining market value no consideration could be given to that use.

But if the reasonable probability of such use was not admitted or conceded or accepted by the Court as established by the Government's action and the testimony of the Government's witnesses, then it was error for the Court to refuse evidence tending to estabilsh such reasonable probability.

Wherefore, it is submitted that the Court erred:

(1) In refusing evidence as to and rejecting Appellant's proof of:

(a) The adaptability and availability of the roads taken for the use for which they were taken. (Specifications of Error 19, 20, 22, 25, 38 and 39);

(b) The reasonable probability of such use. (Specifications of Error 19, 20, 21, 26, 36 and 37);

(c) Market value in the light of the reasonable probability of such use. (Specifications of Error 23, 27, 28, 29, 30, 31, 32, 33, 34 and 35).

(2) In instructing the jury as set out in Specifications of Error 14, 15, 16 and 17.

(3) In refusing Appellant's Requested instructions Nos. 3, 8 and 13. (Specifications of Error 11, 12 and 13.)

B. EARNINGS REASONABLY TO BE EXPECTED FROM THE USE OF PROPERTY BEING CONDEMNED FOR THE PURPOSES FOR WHICH THAT PROPERTY IS TAKEN MAY BE CONSIDERED IN DETERMINING MARKET VALUE AND JUST COMPENSATION.

Specifications of Error 19, 20, 21, 23, 25, 26, 29, 30, 31, 33, 35, 36, and 37.

It is the rule of this circuit that "capitalization of rental value is evidence of the market value of the land." *U. S.* vs. *Waterhouse,* 132 Fed. (2D) 699, 702, citing:

> *North American Tel. Co.* vs. *Northern Pacific Ry . Co.,* 254 Fed. 417, Cert. Den. 249 U. S. 607, 39 Sup. Ct. 290, 63 L. ed. 799 (CCA 8);
>
> *U. S.* vs. *Shingle,* 91 Fed. (2d) 85, 89, Cert. Den. 302 U. S. 746, 58 Sup. Ct. 264, 82 L. ed. 577.

Here the evidence disclosed the availability of the roads taken for the removal of one billion to one billion four hundred million feet of mature virgin timber, that the government expected that quantity of timber to move out from the Olympic National Forest over these roads, that some part of that timber had been so removed prior to the

purported taking, and that appellant had received rental for such use of these roads. Appelant's proffered proof that the timber in the area of the Olympic National Forest known as the Humptulips Basin or Humptulips Working Circle would be removed over these roads (Specifications of Error 20, 21, 22, 26, 27) of the rate at which the Government expected to remove that timber (Specifications of Error 36 and 37), that a rental of $1.50 per thousand feet would have been paid for the use of its roads for that purpose (Specification of Error 23), and of the market value of the lands taken, taking these factors into consideration (Specifications of Error 29, 30, 31, 33 and 35), was rejected. In so doing, the District Court erred to Appellant's prejudice.

WHEREFORE, the judgment of the District Court should be reversed and the cause remanded.

(a) With instructions to vacate and adjudge null and void the third declaration of taking, filed November 12, 1943, and to dismiss the second amended petition in condemnation and this proceeding; or, in any event, to quash, set aside and vacate the judgment on the declaration of taking entered May 23, 1944, in so far as it finds and adjudges the Secretary of Agriculture is authorized and empowered to acquire the so-called "gravel lands" (Tracts 2 and 3) and in so far as it confirms any possession taken

prior to November 12, 1943, and to dismiss the second amended petition in condemnation and this proceeding as to Tracts 2 and 3;

(b) If the third declaration of taking is not wholly set aside and adjudged void and of no effect and the proceeding dismissed, then with instructions to set aside the judgment on the verdict and grant Appellant a new trial; and

(c) With such further instructions as this Honorable Court may deem just and proper in the premises.

Respectfully submitted,

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Attorneys for Appellant,
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Appendix

DEPARTMENT OF AGRICULTURE APPROPRIATION ACT, 1942

CHAPTER 267 — 1ST SESSION

PUBLIC LAW 144 - 77TH CONGRESS

(H. R. 3735)

An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1942, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Agriculture for the fiscal year ending June 30, 1942, namely:

* * *

FOREST SERVICE

Salaries and Expenses

* * *

National forest protection and management: For

the administration, protection, use, maintenance, improvement and development of the national forests, including the establishment and maintenance of forest tree nurseries, including the procurement of tree seed and nursery stock by purchase, production, or otherwise, seeding and tree planting and the care of plantations and young growth; the maintenance and operation of aerial fire control by contract or otherwise; the maintenance of roads and trails and the construction and maintenance of all other improvements necessary for the proper and economical administration, protection, development, and use of the national forests, including experimental areas under Forest Service administration: *Provided,* That where, in the opinion of the Secretary of Agriculture, direct purchases will be more economical than construction, improvements may be purchased; the construction, equipment, and maintenance of sanitary, fire preventative, and recreational facilities; control of destructive forest tree diseases and insects; timber cultural operations; development and application of fish and game management plans; propagation and transplanting of plants suitable for planting on semiarid portions of the national forests, estimating and appraising of timber and other resources and development and application of plans for their effective management, sale, and use; examination, classification, surveying, and appraisal of land incident

to effecting exchanges authorized by law and of lands within the boundaries of the national forests that may be opened to homestead settlement and entry under the Act of June 11, 1906, and the Act of August 10, 1912 (16 U. S. C. 506-509), as provided by the Act of March 4, 1913 (16 U. S. C. 512); and all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted under the Act of March 1, 1911 (16 U. S. C. 521), and the Act of June 7, 1924 (16 U. S. C. 471, 499, 505, 564-570), lands transferred by authority of the Secretary of Agriculture from the Resettlement Administration to the Forest Service, and lands transferred to the Forest Service under authority of the Bankhead-Jones Farm Tenant Act, $11,050,411, of which $14,411 shall be transferred to and made a part of the appropriation, "Salaries and expenses, Bureau of Agricultural Economics": *Provided,* That $200 of this appropriation shall be available for the expenses of properly caring for the graves of fire fighters buried at Wallace, Idaho; Newport, Washington; and Saint Maries, Idaho: *Provided further,* That in sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by the Act of May

23, 1908 (16 U. S. C. 500), and the Act of March 4, 1913 (16 U. S. C. 501), shall be based upon the stumpage value of the timber.

* * *

Acquisition of Lands for National Forests

For the acquisition of forest lands under the provisions of the Act approved March 1, 1911, as amended (16 U. S. C. 513-519, 521), including the transfer to the Office of the Solicitor of such funds for the employment by that office of persons and means in the District of Columbia and elsewhere as may be necessary in connection with the acquisition of such lands, $1,797,348, of which $9,348 shall be transferred to and made a part of the appropriation, "Salaries and Expenses, Bureau of Agricultural Economics": *Provided,* That not to exceed $80,000 of the sum appropriated in this paragraph may be expended for departmental personal services in the District of Columbia.

* * *

FOREST ROADS AND TRAILS

For carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23), including not to exceed $59,500 for departmental personal services in the District of

Columbia, $9,990,165 of which $34,665 shall be transferred to and made a part of the appropriation, "Salaries and expenses, Bureau of Agricultural Economics," which sum is a part of the balance of the amount authorized to be appropriated for the fiscal year 1941 by the Act approved June 8, 1938 (52 Stat. 635), to be immediately available and to remain available until expended: *Provided,* That this appropriation shall be available for the rental, purchase, or construction of buildings necessary for the storage and repair of equipment and supplies used for road and trail construction and maintenance, but the total cost of any such building purchased or constructed under this authorization shall not exceed $7,500: *Provided further,* That there shall be available from this appropriation not to exceed $5,000 for the purchase of land and $45,000 for the construction of a building at Missoula, Montana, for the storage and repair of Government equipment for use in the construction and maintenance of roads.

* * *

FEDERAL HIGHWAY ACT OF 1940

CHAPTER 715 - 3D SESSION

(PUBLIC NO. 780 - 76TH CONGRESS)

(H. R. 9575)

An Act to amend the Federal Aid Act, approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

* * *

Sec. 6. For the purpose of carrying out the provisions of Section 23 of the Federal Highway Act (42 Stat. 218), as amended and supplemented, there is hereby authorized to be appropriated (1) for forest highways the sum of $7,000,000 for the fiscal year ending June 30, 1942, and the sum of $7,000,000 for the fiscal year ending June 30, 1943: *Provided,* That hereafter appropriations for forest highways shall be administered in conformity with the regulations jointly approved by the Secretary of Agriculture and the Federal Works Administrator; and (2) for forest development, roads and trails the sum of $3,000,000 for the fiscal year ending June 30, 1942, and the sum of $3,000,000 for the fiscal year ending June 30, 1943: *And provided further,* That the apportionment for forest highways in Alaska shall be for each of the fiscal years $500,000 and that such additional amount as otherwise would have been apportioned to Alaska for each of said fiscal years shall be apportioned among those States, including Puerto

Rico, whose forest highway apportionment for such fiscal year otherwise would be less than 1 per centum of the entire apportionment for forest highways for that fiscal year: *And provided further,* That apportionments among those States, including Puerto Rico, whose forest highway apportionments for such fiscal year otherwise would be less than 1 per centum of the entire apportionment for forest highways for that fiscal year may be made without regard to the provisions of said Section 23 relating to apportionments, but in no case shall the apportionment to any State under this provision be in excess of 20 per centum of the total of funds affected thereby, and the total of the apportionments to each State during the six-year period beginning with the fiscal year 1942 shall equal the total of the apportionments that would have been made to each State during such period if the discretionary power conferred by this proviso had not been exercised.

* * *

DEPARTMENT OF AGRICULTURE APPROPRIATION ACT, 1944

CHAPTER 215 - PUBLIC LAW 129

(H. R. 2481)

An Act making appropriations for the Department

of Agriculture for the fiscal year ending June 30, 1944, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Agriculture for the fiscal year ending June 30, 1944, namely:

* * *

FOREST SERVICE

Salaries and Expenses

* * *

National forest protection and management: For the administration, protection, use, maintenance, improvement, and development of the national forests, including the establishment and maintenance of forest tree nurseries, including the procurement of tree seed and nursery stock by purchase, production, or otherwise, seeding and tree planting and the care of plantations and young growth; the maintenance and operation of aerial fire control by contract or otherwise, with authority to renew any contract for such purpose annually, not more than twice, without additional advertising; the maintenance of roads and

trails and the construction and maintenance of all other improvements necessary for the proper and economical administration, protection, development, and use of the national forests, including experimental areas under Forest Service administration: *Provided,* That where, in the opinion of the Secretary, direct purchases will be more economical than construction, improvements may be purchased; the construction, equipment and maintenance of sanitary, fire preventive, and recreational facilities; control of destructive forest tree diseases and insects; timber cultural operations; development and application of fish and game management plans; propagation and transplanting of plants suitable for planting on semiarid portions of the national forests; estimating and appraising of timber and other resources and the development and application of plans for their effective management, sale, and use; acceptance of moneys from timber purchasers for deposit into the Treasury in the trust account Forest Service Cooperative Fund, which moneys are hereby appropriated and made available until expended for scaling services requested by purchasers in addition to those required by the Forest Service, and for refunds of amounts deposited in excess of the cost of such work; examination, classification, surveying, and appraisal of land incident to effecting exchanges authorized by law and of lands within the boundaries of the national

forests that may be opened to homestead settlement and entry under the Act of June 11, 1906, and the Act of August 10, 1912 (16 U. S. C. 506-509), as provided by the Act of March 4, 1913 (16 U. S. C. 512); and all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted under the Act of March 1, 1911 (16 U. S. C. 521), and the Act of June 7, 1924 (16 U. S. C. 471, 499, 505, 564-570), lands transferred by authority of the Secretary from the Resettlement Administration to the Forest Service, and lands transferred to the Forest Service under authority of the Bankhead-Jones Farm Tenant Act, $14,978,537: *Provided,* That this appropriation shall be available for the expenses of properly caring for the graves of persons who have lost their lives as a result of fighting fires while employed by the Forest Service: *Provided further,* That in sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by the Act of May 23, 1908 (16 U. S. C. 500), and the Act of March 4, 1913 (16 U. S. C. 501), shall be based upon the stumpage value of the timber.

* * *

Acquisition of Lands for National Forests

For the acquisition of forest lands under the provisions of the Act approved March 1, 1911, as amended (16 U. S. C. 513-519, 521), $100,000, of which not to exceed $18,675 may be expended for personal services in the District of Columbia.

Total, Forest Service, $24,678,065.

* * *

FOREST ROADS AND TRAILS

For carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23), and for the construction, reconstruction, and maintenance of roads and trails on experimental areas under Forest Service administration, including not to exceed $59,500 for personal services in the District of Columbia, $2,537,168 for forest development roads and trails, representing the balance of the amount authorized to be appropriated therefor for the fiscal year 1943 by the Act of September 5, 1940 (54 Stat. 867), together with $1,241,555 from the unobligated balances of previous appropriations for forest highways which is hereby reappropriated for forest development roads and trails; in all, $3,778,723, to be immediately avail-

able and to remain available until expended: *Provided,* That this appropriation shall be available for the rental, purchase, or construction of buildings necessary for the storage and repair of equipment and supplies used for road and trail construction and maintenance, but the total cost of any such building purchased or constructed under this authorization shall not exceed $7,500.

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RURAL POST ROADS — GOVERNMENT AID

CHAPTER 236 - PUBLIC LAW 146

(H. R. 2798)

An Act to amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The definition of the term "construction" in Section 2 of the Federal Highway Act approved November 9, 1921 (42 Stat. 212), is hereby amended to read as follows: "The term 'construction' means

the supervising, inspecting, actual building, and all expenses, including the costs of rights-of-way, incidental to the construction of a highway, except locating, surveying, and mapping."